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Embedding Policy Statements in Statutes: A Comparative Perspective on the Genesis of a New Public Law Jurisprudence

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Given the central importance of legislation in our legal order, there has been remarkably little research about draftsmen's experiences in devising substantive formulas and procedural devices to translate declared policy into living policy. If we turn to the available literature on sanctions or comparative studies of modes of implementing legislated policy, we are in an area of neglect which should be deemed the prime scandal of legal research. [1]

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* The research for this Article was undertaken while the author was an Associate Professor, Faculty of Law, Dalhousie University, Canada. The Article had its genesis in a research grant from the Federal Department of Communications, Ottawa, Canada for a study entitled An Analysis of Parliament's Objectives for Canadian Broadcasting: Recommendations for Future Legislative Action (1980) (unpublished M.S., Federal Department of Communications, Ottawa). In the course of that study, the author became interested in the problem of how complex policy messages having over-arching, national characteristics can be effectively transmuted into workable legislation. The Article enlarges on several tentative suggestions made in that study, and considers the problem from a comparative perspective. The author is indebted to his former colleagues, Professor Wayne MacKay (Dalhousie Law School) and Mr. Murray Davidson (School of Public Administration, Dalhousie University) who worked on the above mentioned study with him, and to his research assistant, Stephanie Robinson (now with the Federal Law Reform Commission, Ottawa, Canada). In the course of that study, several useful discussions were held with Mr. David Gillick, a Policy Analyst with the Federal Department of Communications. R. St. J. MacDonald (Professor of Law, Dalhousie Law School, and Judge of the European Court of Human Rights, Strasbourg) as always, offered both encouragement and perceptive comments on an early draft. Professor P.S. Atiyah of Oxford University also offered incisive commentary on an early draft. None of the views offered herein should be ascribed to any Canadian federal agency. Weaknesses in the work, of course, remain the author's responsibility.

1. Hurst, *Legislation as a Field of Legal Research*, 2 HARV. J. ON LEGIS. 3, 4 (1965).

I. INTRODUCTION

The most significant development in the formulation of statutes in the common law world in recent years has been an experiment with a technique which involves embedding extensive declarations or policy statements into the body of a statute, so that a "mini-constitution" becomes part of the statute itself. This experiment has been confined mainly, but not exclusively, to the United States and Canada. A typical example of such a provision, and perhaps the most widely noted, is section 101 of the United States National Environmental Policy Act (1969), which provides:[2]

> Declaration of National Environmental Policy 101. (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.
>
> (b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs and resources to the end that the Nation may—
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> (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
>
> (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
>
> (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
>
> (4) preserve important historic, cultural, and natural aspects of

2. 42 U.S.C. §§ 4331-4335, 4341-4342, 4344 [hereinafter cited as NEPA].

our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

The emergence of this technique has attracted no academic or critical commentary as such.[3] Such published commentaries as there are on statutes having this characteristic are directed to a particular statute and cases arising thereunder.[4] The absence of generalized commentary seems surprising and is difficult to account for.[5]

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3. For a useful general survey of legislative techniques, see Cranston, *Reform Through Legislation: The Dimension of Legislative Technique*, 73 NW. U.L. REV. 873 (1978). The Legal Process course taught at Harvard by Professors Hart and Sachs directed much of its attention to problems of legislative technique but did not deal directly with the topic raised in this article. *See* H. HART & A. SACHS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tentative ed. 1958). *See also* Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786 (1967). In Canada the problem of broad statutory manifestos was raised in *Law Reform Commission of Canada, Working Paper No. 25, Independent Administrative Agencies* (1980), but the Commission did not go beyond a weak recommendation that "this type of problem should be weighed by responsible authorities when legislation is at an initial planning stage." *Id.* at 54.

4. *See, e.g.*, Henderson & Pearson, *Implementing Federal Environmental Policies: The Limits of Aspirational Commands*, 78 COLUM. L. REV. 1429 (1978). The only generalised, theoretical study appears to be Gifford, *Communication of Legal Standards, Policy Development, and Effective Conduct Regulation*, 56 CORNELL L. REV. 409 (1971).

More recently, some absorbing theoretical studies have appeared in U.S. law review literature on the question of "law transmission." In Abrahams, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair*, 32 RUTGERS L. REV. 676 (1979) the author takes William Blake's poem "Tiger, tiger, burning bright" and examines the relationship between critical literary theory and statutory interpretation. He believes that the difference between statutory and literary interpretation is that there is no symbolism in states and no central authority in the literary world. The similarity lies in categorization in the search for meaning and, above all, in the self-preservation of each discipline. In Huszagh, *A Model of the Law Communication Process: Formal and Free Law*, 13 GA. L. REV. 193 (1978), and Huszagh, *Production and Consumption of Informal Law: A Model for Identifying Information Loss*, 13 GA. L. REV. 515 (1979), the author examines how government decrees are made available to citizens and seek to identify those conditions under which various citizens are not likely to acquire the knowledge essential for deference that (in their view) the contemporary American model of government requires.

See also W. PROBERT, LAW LANGUAGE AND COMMUNICATION (1972); Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor with an Application to Justice Rehnquist*, 57 N.Y.U. L. Rev. 1 (1982).

5. As long ago as 1915, Ernst Freund called for a new science of jurisprudence to deal

This Article has four objectives. First, to draw attention to this general development in statute formulation. Second, to assess its potential significance. Third, to demonstrate for the benefit of legislators, policy-makers, and lawyers some of the legislative and judicial conditions under which the technique may be a workable and functional vehicle for the transmission of large-scale legislative "messages." Fourth, to remind academic lawyers that while they debate largely outdated public law theory, the way in which public affairs are conducted moves on: public law in the Western world is in the process of re-shaping itself, and the "facts" have far outdistanced contemporary theory.

Part II of the Article suggests several dimensions in which these "new" statutes may be significant. Part III explains in more detail the particular method of analysis which will be followed herein. Parts IV to VI examine statutes from three different common law countries (U.S.A.; Canada; New Zealand) where this technique has been utilized. Part VII synthesizes those legislative and judicial attributes which would appear to be most critical to the success of the technique.

The thrust of this Article is that these new statutes represent a fumbling movement towards a new statutory vehicle which could be called a Statutory Management Model. Under this model—which is both declaratory and dynamic—distinctions are drawn between the objectives of legislation, policies for attaining those objectives, and methods of implementing policies. Objectives are conceived as being durable in character and of overarching, national dimension. They are set by the legislature, whose primary concern is goal formulation. Policies are means of attaining the objectives. Policy-making requires flexibility and frequent amendment. Hence, that exercise is entrusted to a federal department or a subordinate agency armed with authority to evolve

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with the problems of legislation and their solution. *See* E. FREUND, STANDARDS OF AMERICAN LEGISLATION 310-14 (1917). *See also* E. FREUND, LEGISLATIVE REGULATION (1932). Dean Roscoe Pound issued a similar challenge in 1959, which has also gone largely unheeded. *See* 1 R. POUND, JURISPRUDENCE 350-58 (1959).

Much of the fault rests with law schools: if a "legislation" course is taught at all, it is all too often an arid course in statutory construction. Since an inordinately large part of the work of all courts and tribunals is concerned with the interpretation and application of statutes, techniques of interpretation of statutes *are* epicentric to individual cases. But to concentrate almost exclusively upon techniques of interpretation is to make the same mistake that many case-method teachers make: the material at hand is treated as standing by itself, naked and shivering and ready to be analyzed in effect as a cadaver. Treating legislation in an atomized manner for pedagogical purposes is undoubtedly even less defensible than the "pure" case method. *See also* B. LAMMERS, LEGISLATIVE PROCESS AND DRAFTING IN U.S. LAW SCHOOLS (1977); Dickerson, *Legislative Process and Drafting in U.S. Law Schools: A Close Look at the Lammers Report*, 31 J. LEGAL EDUC. 30 (1981).

policies (and if necessary to administer and regulate them). The role of the courts in this model is to assist in articulating the integrity of the legislation, in seeing that that integrity is maintained, and in ensuring that agencies stay within the four corners of the legislative scheme as conceived. The model is a complex one and extends much further than the traditional models of delegated legislation. As a method of ordering, it does not rest on fiat in the traditional, hierarchical, linear sense. It explicitly recognizes the symbiotic relationship among all organs of modern government and makes all those organs responsible for the legislative health of an organic whole. It is consistent with democratic theory, in that legislative supremacy is not challenged, yet it is sufficiently flexible to enable the complex adjustment demands of the modern regulatory state to be met. The courts are given a role which they can live with. The model, and the penumbra of understanding which surrounds it, may represent the genesis of a new kind of public law jurisprudence. The model should be utilized with caution and with a proper understanding of its limitations.

A general caveat should be entered at this point. An attempt to reduce these large scale issues to the bounds of a conventional law review article is, realistically, too ambitious. The scope of the topic is such that it would be better suited to a monograph. It is necessary to produce, at this time, something closer to a sketch. Hence, qualifications or refinements that ought to be explored are reduced to mere notes or sentences or omitted altogether. Yet all writing is ultimately an act of faith—that it will either stimulate or aggravate somebody—and even a sketch may have that result.

II. THE POTENTIAL SIGNIFICANCE OF "POLICY-STUDDED" STATUTES

There are sound reasons why lawyers and policy-makers with interests in legislation, regulation, administrative law, constitutional law, jurisprudence, and comparative law should all be interested in these new model statutes.

A. Traditional Techniques

Modest purpose clauses in statutes were not unknown prior to the 1960's.[6] Vagueness as a legislative technique has long since gained at

6. Academic and professional opinion of such clauses seems to have been lukewarm at best. *See* Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 378 (1947). Professor Reed Dickerson, a leading U.S. commentator on legislation, has

least a measure of respectability in statute-drafting.[7] Ambiguities of

claimed: "Because general statements of purpose serve best as antidotes to inadequate draftsmanship, the draftsman who doubts his own draftsmanship would do better to omit any such statement, because the deficiencies of draftsmanship that infect the working provisions of the bill are likely also to infect its statement of purpose. Instead, he should let the court draw its own conclusions about legislative purpose from the evidence provided by the working provisions and context of the statute. If, on the other hand, he is sure of his draftsmanship, he is assuming a condition in which a general purpose clause would not normally be needed. A general legislative purpose clause may, however, be helpful where a very general statute in effect delegates lawmaking power to the courts." R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 97-98 (1975). The *Canadian Legislative Drafting Conventions* provide: "Where a separate statement enunciating the objects or purposes of an Act is used, it should be drafted with great care and should not be in the form of a preamble." *Uniform Law Conference of Canada, Proceedings*, 24 (1978).

7. The enormous success of the U.S. Uniform Commerical Code should not be overlooked in this context. This code was conceived by Mr. William Schnader, but Karl Llewellyn, Soia Mentschikof, and Grant Gilmore played a large role in the design and text of the Code. Regrettably there is no detailed history of the "evolution" of the code. Professor W. Twining has catalogued Llewellyn's papers at the University of Chicago Law School in THE KARL LLEWELLYN PAPERS (1968). *See also*, Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1 (1967); W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973). The significance of the Code for the purpose of this Article is that—presumably under Llewellyn's direction—it makes extensive use of "open-ended" drafting. Thus articles two and nine respectively use phrases such as "commercial reasonableness" and "good faith." The Code has also appended to each section of the 1962 Official Text of the Code an "Official Comment." Llewellyn himself explained the purpose of these Comments thus: "Every provision should show its reason on its face. Every body of provisions should display on their face their organizing principle. The rationale of this is that construction and application are intellectually impossible except with reference to *some* reason and theory of purpose and organization" (italics in original) (KARL LLEWELLYN PAPERS, *supra*, Item J VI 1.c.5. (1944)). There seems to be no published commentary on the general impact of the code on statute drafting in the United States. It seems at least a plausible thesis that the code accelerated (initiated?) a movement into more "open" drafting. *See also* Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 GA. L. REV. 605 (1981); Danzig, *A Comment On the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975).

Much of Llewellyn's work was concerned with the relationship between the static and dynamic aspects of law and legal techniques. His concept of a Grand Style in appellate judging has many affinities, conceptually, with these new statutes, and would have probably excited his attention:

> [T]ension between form, or precedent, or other tradition and perceived need requires, in nature, to be a tension *only for the single crisis*. It does not have to be a continuing tension in the legal system as a whole, because an adequately resilient legal system can, on occasion, or even almost regularly, absorb the particular trouble and resolve it each time into a new, usefully guiding, forward-looking felt standard-for-action or even rule-of-law.

K. LLEWELLYN, THE COMMON LAW TRADITION—DECIDING APPEALS 513 (1960) (italics in original).

Lon Fuller would also have been interested in these "new" statutes insofar as much of his work appears to have contemplated an evolving process of law development as a means of addressing the static/dynamic tension. In Fuller's view, a piece of legislation represents

various kinds abound in statutes. Although there is a semantic distinction between an ambiguity and a vague statement, functionally both fall into one of these categories: negligent ambiguities, constructive ambiguities, and constitutional ambiguities.

Negligent ambiguities involve oversights of varying culpability and consequence. The constructive or designed ambiguity on the other hand is not a blunder; it is an art form. It observes the distinction between ambiguity and vagueness. Constructive ambiguities serve at least two purposes. Either a legislature may be unable to foresee the possible range of events which may come within the prospective phraseology, or the phrase may represent some sort of political compromise to save the legislation. Compromise is itself an ambiguous word. It may connote a sell-out of virtue or, in its positive sense, an accommodation of conflicting interests. It may be that such compromise statements are entirely defensible: when conflicting interests or principles of real significance are at stake there must often be a compromise, otherwise one principle or interest may be destroyed or unduly subordinated.

Constitutional ambiguities are creative ambiguities "with brushes of comets' hair."[8] These are the great constitutional phrases ("due process," "probable cause," "equal protection," "unreasonable searches," and the like) and are deliberately designed, at least in a constitutional document, to be shaped and reshaped to meet the needs of evolving, democratic, pluralistic societies. But it seems unlikely that the emergence of the new model statutes rests on a simple extension of these

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an incompletely defined purpose which becomes progressively articulated around a central "core" of words. In L. FULLER, THE MORALITY OF LAW (1964), his reference to the "usefulness" of "the figure of incomplete invention" is revealing and is also consistent with the notions of some of the linguistic philosophers. *Id.* at 87. *See also* Fuller, *Human Purpose & Natural Law*, 3 NATURAL L.F. 68 (1958).

8. R. KIPLING, *When Earth's Last Picture Is Painted* in 2 KIPLING, A SELECTION OF HIS STORIES AND POEMS 482 (J. Beecroft ed. 1892) ("And those that were good shall be happy they shall sit in a golden chair; They shall splash at a ten-league canvas with brushes of comets' hair"), cited (in attenuated form) in Hufstedler, *In the Name of Justice: The Unending Rush to the Courts*, 83 VITAL SPEECHES 572 (1977). The distinctions in this paragraph are drawn on Judge Hufstedler's insights. In BENNION, STATUTE LAW (1980), there apparently is an analysis of various categories of cases in which Parliament must be taken to have delegated to the judiciary the power to fill in blanks or to amend its handiwork. (The book is currently not available to the author.) *See* Cross, *Book Review*, 1981 STATUTE L. REV. 122. *See also* CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 31-43, 72-80 (1982); Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981); Ginsburg, *Inviting Judicial Activism: A "Liberal" or "Conservative" Technique?* 15 GA. L. REV. 539 (1981).

now-familiar techniques. Both their appearance and significance seem to raise more complex issues.

B. The Regulatory Dimension

The mix of political, social, and economic policies which make up the "public philosophy" of any given government is today infinitely variable. In theory, the spectrum ranges from hard-line, doctrinaire communism on the one hand through to minimal state involvement in the daily lives of the citizens on the other hand. The reality is somewhat different. The common law jurisdictions could all in general terms be classified today as "mixed" systems. These countries all share a belief in the value of the individual and the consequences which flow from that premise. They have also increasingly come to accept that for good and sufficient cause, state involvement or regulation may be required to correct or adjust perceived abuses. The philosophy is (apparently) that there is a "right balance" which is somehow attainable between the worst excesses of the individual ethic (in all its manifestations) on the one hand, and collective need on the other. The result has been a steady drift into the regulated state.[9] Originally this movement (aided and abetted by the exigencies of depression and war) occurred in the economic sphere, but today the term "social regulation" is increasingly being heard.

Against this background, it is hardly surprising that legislatures in modern nation-states have had difficulty in transmitting their message(s). The linear dimensions of the traditional statute—with its aspects of fiat, precision, and particularity—have had to yield a much more complex model in such major regulatory areas as telecommunications, environmental matters, transport, energy, and financial policy. In North America, the new model includes extensive delegation of

9. The magnitude of the impact cannot be assessed in simple statistical terms. Still, bare figures give some glimpse of the context. In the United States twelve major federal agencies spent an aggregate $8.53 billion in fiscal year 1979. Estimates of the direct and indirect economic burdens of those agencies have been claimed to run as high as $130 billion per annum. *See* Wood, Laws & Breen, *Restraining the Regulators: Legal Perspectives on a Regulatory Budget for Federal Agencies*, 18 HARV. J. ON LEGIS. 1, 2-3 (1981). At the Congressional level the paper explosion is awesome. In the 1977-78 session, congressmen introduced 22,313 public and private bills and resolutions. The House filed reports on 1,810 of them; the Senate, 1,413; 3,211 bills were passed with 804 bills finally enacted into law. Szulc, *Is Congress Obsolete?*, SATURDAY REVIEW, March 3, 1979, at 20. For discussions of the extent of the regulatory explosion in Canada, *see generally* W. STANBURY, GOVERNMENT REGULATION: SCOPE, GROWTH, PROGRESS (1980) and MINISTER OF SUPPLY & SERVICES, ECONOMIC COUNCIL OF CANADA, RESPONSIBLE REGULATION, INTERIM REPORT (1979).

subordinate legislative powers.[10] Hence, the challenge to those concerned with the formulation of primary, enabling legislation of a national character is today a critical one. Governmental intervention in, and direction of, an activity must be *both* declaratory and dynamic: the statement of a particular perspective must also provide a framework for the ordered development of the activity in accordance with the philosophy inherent in that perspective. The emergence of the policy-studded statute is thus one response to the emergence of the modern, centralized, planned state.

It is true that the last five years have seen staggering successes (at least in economic deregulation) in a number of key sectors in the United States: airlines, railways, crude oil, banking, natural gas, trucking, and communications. Yet even this transformation has had to be *managed*. Indeed, it has been claimed that "without a politically acceptable transition, deregulation may be doomed."[11] Serious consideration therefore has to be given to legislative techniques, even in a matrix in which *deregulation* is determined to be the desired path.

The use of these statutes in the regulatory sphere is significant in another respect. While the policy statements contained in the statutes are in part declaratory in nature, they also have clear aspirational overtones. In Patrick Atiyah's phrase (from another context), they are

10. Some readers outside the United States and Canada may not be familiar with the "regulatory model" which has emerged in those two countries. Typically, the formally superior legislature (Parliament, Congress) enacts, in those areas where it has authority so to act, a statute which sets up an agency such as the Federal Trade Commission in the United States or the Canadian Radio & Television Commission. The agency is given power to "regulate" a particular sphere of activity, e.g., telecommunications, and that power usually also embraces extensive rule-making or directive powers on the part of the agency. The kind of relationship which should exist between the legislature and the agency has occasioned much debate. *See, e.g.*, Janisch, *Policy Making in Regulation: Towards a New Definition of the Status of Independent Regulatory Agencies in Canada*, 17 OSGOODE HALL L.J. 46 (1979); Janisch, *The Role of the Independent Regulatory Agency in Canada*, 27 U.N.B.L.J. 83 (1978). Intervention by the courts may occur at several levels: citizen versus agency; agency versus legislature; agency versus another agency; citizen versus legislature (*i.e.*, a challenge to the enabling legislation). For a good survey of the evolution of this model in the United States see, S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 1-35 (1979).

11. Magat, *Managing the Transition to Deregulation*, 44 LAW & CONTEMP. PROBS. 1 (1981). *See also* L. WHITE, REFORMING REGULATION: PROCESSES AND PROBLEMS (1981); T. CLARK, M. KOSTERS & J. MILLER, REFORMING REGULATION (1980); Pertschuk, *Regulatory Reform through the Looking Glass*, 65 A.B.A. J. 556 (1979); Baron de Rothschild, *The Future of Free Enterprise: Can it Survive Government Interventionism?* 1 NW. J. INT'L LAW & BUS. 33 (1979).

"hortatory"[12] or admonitory in character. They amount to a statement of what ought to be. Governments, it seems, are going into the business of formal moral persuasion. This, of necessity, raises questions about the limits of law,[13] the effect of legally expressed moral suasion as an instrument of national policy, and the kinds of sanctions or rewards (if any) which are necessary to make such legislation effective. Questions like these have been explored in great detail in the criminal law arena, but there is very little commentary of this kind in the literature of economic regulation.[14]

C. The Legislative Dimension: The Form and Interpretation of Statutes

In a recent controversial thesis, Sir William Dale suggested that a profound change is needed in the way in which statutes are drafted. In Sir William's view, draftsmen in the common law world should "reduce the verbal impediments; be less fussy over detail, be more general and concise. . . ," and move to a continental mode by "a determination to seek principle, to express it, and to follow up with [only] such detail" as the circumstances require.[15] Some British judges have claimed that they would react positively to statutes drawn in this "new" mode. Lord Denning, for instance, told the Renton Committee[16] that "if the draftsman could make Acts simpler, the judges would alter their approach to them. . . . It could be done by breaking up the form of

12. P. ATIYAH, FROM PRINCIPLES TO PRAGMATISM: CHANGES IN THE FUNCTION OF THE JUDICIAL PROCESS AND THE LAW 4 (1978).

13. The "limits of law" might mean practical limits or ethical limits. That is, there are limits to what law *can* do as well as to what it *should* do. Law is also limited by its very nature in the extent to which it can secure justice and other societal objectives. And of course a discussion of law's "limits" implies that it has certain functions. These might include social control (personal security, freedom), dispute settlement (interpersonal and intergroup harmony), and moral education. The "new" form of statute might be seen as an interesting attempt to link all three purposes.

14. For a collection of materials on the effectiveness of moral suasion as an adjunct of formal regulatory changes, see L. FRIEDMAN & S. MACAULAY, LAW AND THE BEHAVIORAL SCIENCES, 246-53, 307-41 (2d ed. 1977).

15. W. DALE, LEGISLATIVE DRAFTING: A NEW APPROACH 335-36 (1977). This work engendered considerable controversy in the British Commonwealth. The author replied to his critics in Dale, *Legislative Drafting: A New Approach—Reviewing the Reviewers*, 1981 STATUTE L. REV. 69. *See also* three papers delivered at the Commonwealth Law Conference, Edinburgh: Bennion, *Improvements in Legislative Techniques*; Elliott, *The Scope for "General Principle" Legislation*; Marshall & Simmonds, *The Future of Legislation in the U.K.*, (Proceedings of the Fifth Commonwealth Law Conference, 53-83 (1977)).

16. COMMITTEE ON PREPARATION OF LEGISLATION, FIRST REPORT, CMD. NO. 6053 (1975) [hereinafter cited as RENTON COMMITTEE REPORT]. Sir David Renton was chairman of the committee.

the statutes, by making them simpler, sticking more to the principles and not going so much into detail."[17] And Lords Emslie and Wheatley told the same committee: "It is probably the case that legislation in detail is resorted to because Parliamentarians harbour the suspicion that Judges cannot be trusted to give proper effect to clear statements of principle. This, with respect to them (the Parliamentarians), is wholly unfounded."[18] Sir William (and perhaps these judges as well) was seemingly unaware that there were already in existence in some other jurisdictions statutes in which something close to the "new" mode had been tried. Those statutes, and judicial experience with them, can be used as a yardstick to modify or confirm the Dale thesis. To the extent that a purposive approach to statutory construction would seem to be statutorily mandated by these new statutes, some impetus will likely be given to the already discernible general tendency[19] in favor of "purposive" as opposed to "literal" construction of statutes[20] in both the

17. *Id.* ¶ 19.1. Some American judges have begun speaking out against what they regard as "buck-passing" legislation which leaves critical policy choices to the courts. *See* Harrison v. PPG Industries, Inc., 446 U.S. 578, 595 (1980) (Rehnquist, J., dissenting). "The effort to determine congressional intent here might better be entrusted to a detective than to a judge." Judge McGowan has noted: "A Congress genuinely concerned about delegated power has one effective contribution that it, and only it, can make—the identification and definition, as precisely as possible, of that power, and of the standards to be observed in its exercise." McGowan, *Congress, Courts and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1174 (1977).

18. RENTON COMMITTEE REPORT, *supra* note 16, ¶ 19.41. The committee endorsed the approach of these judges, and the English government has gone far toward accepting the committee's recommendations. Draftsmen are now to include in a bill statements of purpose "subject to drafting instructions by responsible Ministries," 412 PARL. DEB., H.L. (5th Ser.) 1588 (1980).

19. *See* articles cited note 21, *infra*. Some respected English judges are now quite pointed in their criticism of the so-called "literal" approach. Lord Scarman expressed surprise at the "literalism" of Australian judges and noted, "In London, no-one would now dare to choose the literal rather than a purposive construction of a statute: and 'legalism' is currently a term of abuse." Scarman, *The Common Law Judge and the Twentieth Century—Happy Marriage or Irretrievable Breakdown?* 7 MONASH U.L. REV. 1, 6 (1980). Also, the House of Lords in Fothergill v. Monarch Airlines Ltd. [1980] 3 W.L.R. 209, recently expressly approved a "purposive" interpretive approach *and* took into account the drafting history of the convention at issue (the International Carriage by Air Rules).

20. There have from time to time been specific proposals for legislative reform of the rules relating to statutory interpretation in the British Commonwealth. For instance in the United Kingdom, the English and Scottish Law Reform Commission produced a report entitled *The Interpretation of Statutes* (Law Comm. 21; Scottish Law Comm. 11) which contained some modest proposals for reform, including the use of some preparatory materials and "any document . . . which is declared by the Act to be a relevant document for the purposes of this section" could be introduced into litigation. (Appendix A, Draft Clause 1(1)(e).) These provisions were never implemented; indeed they were opposed by the Renton Committee. An attempt was made in the respect of The Matrimonial Property Bill 1970 to utilize this suggestion by providing that a report of The Law Reform Commission could

United States and the British Commonwealth.

D. The Constitutional Dimension

There are at least four reasons why constitutional lawyers should interest themselves in these statutes. First, a statute of this "new" kind poses particular difficulties for those lawyers and judges who claim to see a sharp separation between law and government or law and policy. Policy in this view is something which a legislature or government wishes to achieve but, according to the conventional wisdom, must be divined from the words of the statute itself.[21] The new technique *formally* recognizes no such separation; courts and tribunals are placed in a symbiotic relationship with the legislature, and all are conceived as agencies of a complex institution of formal and informal ordering. Even American lawyers and judges, with a tradition both of constitutional interpretation and of constant interplay between the courts and Congress, have not always felt entirely comfortable with these new statutes.[22] It would be dangerous to overstate the impact of these statutes

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be utilized in interpreting that Act. Although some Law Lords, including Lords Denning and Wilberforce, supported the proposal, apparently there was opposition in the House of Commons, on the basis that Parliamentary Supremacy was being challenged. R. CROSS, STATUTORY INTERPRETATION 159 (1976). In Canada, some jurisdictions have expressly legislated in favor of the use of legislative histories as an aid to interpretation. *See, e.g.*, Interpretation Act, N.S. REV. STAT. ch. 151, § 8(5) (1967).

21. There is a volume of literature on this topic. The classic authorities on the "proper approach" to the interpretation of a statute include Willis, *Statutory Interpretation in a Nutshell*, 16 CAN. B. REV. 1 (1938); Corry, *Administrative Law and the Interpretation of Statutes*, 1 U. TORONTO L.J. 286 (1936); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947); Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); McCallum, *Legislative Intent*, 75 YALE L.J. 754 (1966); Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules of Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950); Murphy, *Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975); R. CROSS, *supra* note 20; E. DRIEDGER, THE CONSTRUCTION OF STATUTES (1974); P. MAXWELL, ON THE INTERPRETATION OF STATUTES (P.S.J. Langan 12th ed. 1969); R. DICKERSON, *supra* note 6. For more recent surveys, see Note, *The "Purposive" versus the "Literal" Construction of Statutes*, 55 AUSTL. L.J. 175 (1981); Fiocco & Khan, *Current Approached to Statutory Interpretation*, 1980 N.Z.L.J. 53; Finlay, *Further Reflections on Statutory Interpretation*, 1980 N.Z.L.J. 33; Burrows, *Common Law & Statute*, 1980 N.Z.L.J. 98. Judge Friendly's review of Lord Devlin's book THE JUDGE at 79 MICH. L. REV. 634 (1981) contains some perceptive insights into the differences between U.S. and U.K. practice and approaches.

British Commonwealth readers who are not familiar with the extent to which United States courts allow the use of legislative histories in litigation will find R. DICKERSON, *supra* note 6, ch. 10 useful. American readers who are not familiar with British Commonwealth practice could usefully consult M. ZANDER, THE LAW-MAKING PROCESS 66-82 (1980).

22. Some of the early commentary on the NEPA was critical of the "vague" and unenforceable provisions of the statute. *See* F. ANDERSON, NEPA IN THE COURTS 1-14 (1973).

since they have to date been restricted to key areas of regulatory concern. Still, their significance would appear to rest as much in the realm of political theory as of law, because they represent a new experience in the way in which we govern ourselves and hence in our conception of the rule of law.[23] It follows that if this technique becomes more widespread, some existing doctrines of constitutional and administrative law will require review, particularly in the British Commonwealth.[24]

Second, if a parliament or legislature chose to enact a series of statutes, each of "national" dimensions, each such statute being linked by a common set of overtly declared and statutorily embedded national policies, a signal re-direction of national goals may be imposed, without the difficulty of enacting a formal constitution. Such a revolution would be a quiet one. This phenomenon has already occurred in Canada.[25] Surprisingly, it has not attracted attention from Canadian public law theorists.

Third, there has been much debate in recent years in the United Kingdom and the British Commonwealth countries over the merits or otherwise of an entrenched Bill of Rights.[26] The debate has been conducted in black and white terms: either there should or should not be an entrenched Bill of Rights. Proponents of the two schools of thought have seemed so preoccupied with their particular positions they have not asked what *alternative* statutory schemes might be available.[27] The technique encompassed in the statute under consideration here may well be applicable to areas of basic human and civil rights—albeit

23. The traditional English "Diceyan" conception of the rule of law has (rightly) come in for perceptive criticism in Canada. *See* Arthurs, *Rethinking Administrative Law: A Slightly Dicey Business*, 17 OSGOODE HALL L.J. 1 (1979); Arthurs, *Jonah and the Whale: The Appearance, Disappearance, and Reappearance of Administrative Law*, 30 U. TORONTO L.J. 225 (1980); Willis, *The McRuer Report: Lawyers' Values and Civil Servants' Values*, 18 U. TORONTO L.J. 351 (1968).

24. *E.g.*, doctrines such as jurisdictional control in administrative law. The judgments of Dickson J. of the Canadian Supreme Court are of particular interest on this point insofar as they appear to reflect a more subtle appreciation of the relationship among courts, tribunals, and the legislature. *See, e.g.*, Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corp., 97 D.L.R.3d 417 (1979).

25. *See* National Transportation Act, CAN. REV. STAT. ch. N-17 (1970); Broadcasting Act, CAN. REV. STAT. ch. B-11 (1970); Foreign Investment Review Act, ch. 46, 1973-1974 Can. Stat. See also discussion in section V, *infra*.

26. *See, e.g.*, LORD RADCLIFFE, THE PROBLEM OF POWER (1952); Scarman, *supra* note 19; Mann, *Britain's Bill of Rights*, 94 L.Q. REV. 512 (1978); Yardley, *Constitutional Reform in the United Kingdom*, 33 CURRENT LEGAL PROBS. 147 (1980); M. ZANDER, A BILL OF RIGHTS? (1975); J. JACONELLI, ENACTING A BILL OF RIGHTS (1980).

27. M. ZANDER, *supra* note 26, at 53-56 raised a useful question—what devices *short of* an entrenched Bill of Rights might there be?—but then addressed only *administrative* solutions. *See also* J. JACONELLI, *supra* note 26, at 155-77.

without the ultimate sanction of constitutional entrenchment—and hence could potentially represent an acceptable halfway house between the conventional statute and a constitution.[28]

Fourth, at yet a different level, these "new" kinds of statutes may be significant because they may enable us to test Professor Griffith's acutely controversial assertion that judges exposed to the "British tradition" are fitted neither by training nor by experience to assume a "constitutional role."[29] There is room for profound disagreement as to what is meant by the latter term. Used in a "neutralist" sense, the basic difference between any supreme appellate tribunal deciding constitutional questions and a popularly elected agency of national government is that the court must provide sound principled reasons when it decides a controversy properly before it. If judges render a decision without providing adequate reasons, whether grounded in "the Constitution" (of whatever kind), history, precedent, or events that modify past precedent, it is considered an act of personal fiat. The process in this sense is one of transcending personal value biases, or at the very least the buttressing of those values with reasons that are general and part of the jurisprudential and cultural fabric of the particular society. The qualities of the constitutional judgment must be legal as opposed to ideological. The foundations are therefore reasoned argument, constitutional fidelity, precedent, and an awareness of the historical dimension. When a judgment falls below that standard it is "bad" regardless of the wishes of its creators to "do good."[30]

The "anti-neutralist" position exemplified by Griffith is complex and somewhat ambivalent:

> [T]he judiciary in any modern industrial society . . . is an essential

28. *See* Gordley, *European Codes and American Restatements: Some Difficulties*, 81 COLUM. L. REV. 140 (1981) for a discussion of the two alternatives suggested by that title. For an excellent commentary on comparative constitution drafting, see E. MCWHINNEY, CONSTITUTION MAKING 42-66 (1981).

29. *See* J. GRIFFITH, THE POLITICS OF THE JUDICIARY (1977). Two prominent British judges replied. *See* Scarman, *supra* note 19, at 14, and Lord Devlin, *Judges, Government and Politics*, 41 MOD. L. REV. 501 (1978). *See also* R. STEVENS, LAW AND POLITICS: THE HOUSE OF LORDS AS A JUDICIAL BODY, 1800-1976 (1978); Reynolds, *Statutory Covenants of Fitness and Repair: Social Legislation and the Judges*, 37 MOD. L. REV. 377 (1974), M. ZANDER, *supra* note 26; Hogg, *Is the Supreme Court of Canada Biased in Constitutional Cases?* 57 CAN. B. REV. 721 (1979); Laskin, *The Role and Functions of Final Appellate Courts: The Supreme Court of Canada*, 53 CAN. B. REV. 469 (1975).

30. This exegesis had its most articular exponent in Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). *See also* 78 COLUM. L. REV. 947, 1159 (1978) (a stimulating Festschrift of Wechsler's work); White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973); Conklin, *Clear Cases*, 31 U. TORONTO L.J. 231 (1981).

> part of the system of government and . . . its function may be described as underpinning the stability of that system and as protecting that system from attack by resisting attempts to change it. . . . Only occasionally, in the United States of America, has the power of the supreme judiciary been exercised in the positive assertion of fundamental values."[31]

Griffith further claims that "there are innumerable ways . . . in which the judges can fulfill their political function and do so in the name of the law."[32]

How can we tell whether judges trained in the "British [positivist] manner" would successfully evolve suitable techniques if faced with some kind of constitutional charter? The only experience Commonwealth judges have is with the Canadian Bill of Rights (a performance which has attracted much adverse criticism)[33] and with those statutes which have constitution-like clauses. Anything else has no verifiable basis and hence is likely to be termed speculative.

E. The Comparative and Jurisprudential Dimension

It seems important to ask certain questions of a jurisprudential nature, which are of relevance to comparativists and students of legal theory. This particular statutory technique has come into use in several countries in the last decade. How far is this movement endogenous or spontaneous? If there is no apparent link between this development from one country to another, what (if anything) does that "fact" signify? Does it indicate some kind of evolutionary process is going on independently in different jurisdictions? The issues raised in this question would presumably be of interest to those engaged in the ongoing debate over the development of legal systems.[34] Comparativists should also be interested in the hortatory dimensions of these statutes: are some legal cultures more receptive than others to these overtly normative statutes?

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31. J. GRIFFITH, *supra* note 29, at 213-15.

32. *Id.* at 216.

33. *See, e.g.*, P. WEILER, IN THE LAST RESORT (1974); Gold, *Equality Before the Law in the Supreme Court of Canada: A Case Study*, 18 OSGOODE HALL L.J. 336 (1980).

34. *See* Seidman, *Law and Development: A General Model*, 6 L. & SOC'Y REV. 311 (1972); Friedman, *On Legal Development*, 24 RUTGERS L. REV. 11 (1969); Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1 (1972); Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457 (1977).

III. A METHOD OF ANALYSIS

If it is accepted that a new juristic phenomenon has emerged, and that it merits much closer attention than it has hitherto had, the question arises: how is this to be done? It is not possible to review all the dimensions already adverted to in proper depth in an article of this kind. Neither is it possible to review in any one article all the statutes which have utilized this technique. The dangers of superficiality are undoubtedly already apparent. The approach used here compares a United States federal statute, a Canadian federal statute and a statute from a small "unitary" common law jurisdiction (New Zealand). The choice of jurisdictions may indicate to what extent the constitutional backdrop and legal culture[35] of a particular jurisdiction will affect the manner in which lawyers respond to these new model statutes. It is of course dangerous to assume that an assessment of the origins and treatment of a single statute from three countries with differing constitutional frameworks will be totally successful in anticipating exactly when and under what conditions one of these new model statutes is likely to be effective in achieving its apparent goal: a holistic direction of social activity or a particular industry. Nevertheless, a comparative perspective may bring out dimensions of the problem which would otherwise go unnoticed.

The selected statutes are the National Environmental Policy Act (United States), the Broadcasting Act (Canada), and the Town and Country Planning Act (New Zealand). Each statute contains a statement of objectives within its enacted portion. Each provides for a process whereby objectives are to be implemented. The interrelation between that process and the objectives is both explicit and implicit from a reading of the legislation. The statutes, as can be seen from their titles alone, deal with major and far-reaching activities; they are each regulatory in nature and involve substantial use of the administrative process to which major responsibility for implementation of the scheme is delegated.

The scope of these three statutes raises a multiplicity of issues, evidenced by the considerable volume of texts, articles, and comments available in each area. This Article does not attempt a comprehensive scrutiny of the multifarious issues arising out of each statute. Several basic issues must be considered to evaluate the use of the technique as a

35. The term "legal culture" is here used in an admittedly loose sense: ideas, attitudes, beliefs, expectations and opinions about law.

legislative phenomenon and its appropriateness as a tool in the regulatory and public law process. These issues can be articulated as follows:

1. Structured regulation and development of an activity or area will inevitably lead to conflict with other area demands and individually perceived rights and interests. A balancing process as to goals or policies (or both) might appear to be a major and necessary ingredient of this technique. Is a balancing process a "soft option"? If not, how can this best be provided, and how well does it stand up in practical application to aggressive and often conflicting demands?
2. A legislative statement of goals or objectives should possess some degree of durability. Continuous amendment to take cognizance of changes and development may prove difficult. If a legislative declaration is to achieve an "almost constitutional" character, how can this be blended with the need for flexibility and development without running the risk of a degree of vagueness which defies enforceability and defeats the intended goals?
3. Implementation of the objectives within the total scheme requires a clear and courageous understanding on the part of the various segments of the legal system of their roles in the process. A need exists for each segment to appreciate not only the objectives but also their role in achieving them. How can such an appreciation be achieved, especially in light of existing perceptions of traditional roles and jurisdictions?
4. Each legislative subject comprises not only a major activity, but one prone to constant change and development. High-profile political factors compete with rapidly evolving policy perceptions. What method exists within each scheme for development as circumstances demand, as through basic amendment or through creation of an infrastructure, which is flexible, fluid, or symbiotic in nature?
5. Regulation and development of this nature involves the substantial delegation of discretion and responsibility; the very existence of policy objectives contemplates their constant interpretation and application. What degree of accountability exists within the structure? What provision exists for feedback and review?

The following analysis will proceed through the specific statutory provisions in an effort to provide some answers to these basic questions, and to draw some conclusions as to the appropriateness of the tech-

nique in the particular case. This analysis takes the form of three apparently simple questions in each case. Why was this technique chosen? What form did it take? What happened?

IV. THE NATIONAL ENVIRONMENTAL POLICY ACT—UNITED STATES

A society that blesses private ordering as the basic mode of human interaction does so in the belief that whatever harms will occur will be fewer and less intense than a society in which a central government regulates human conduct. Such a society proceeds on a so-called market basis where numerous participants, good information, and relatively equal bargaining power allow such relatively obvious inequities as occur to be identified, traced to an individual or group of individuals, and resolved in after-the-fact adjudication.[36]

But contemporary life, even in North America, is not like that. The market is an analytical construct and various conditions under which it does not operate effectively have been identified by economists. One of the best known of these conditions is what economists call externalities.[37] In the environmental context, this includes the notion that some harms are cumulative. Lack of clean air is a good example. Often that condition can be traced to no particular individual act. Hence, neither the conventional legal system through common law actions in nuisance or the like[38] nor the market will resolve the problem of a dirty atmosphere.[39] That leaves only the possibility of some central authority with national jurisdiction registering, by some means or other, a preference for clean air. Such a preference might clearly entail adjustment costs in the form of a lesser rate of (conventionally measured) economic growth. Thus stood orthodox thinking in the United

36. *See* J. LIEBERMAN, THE LITIGIOUS SOCIETY (1981). Although this work is concerned with a different thesis (the litigation explosion), it contains a particularly helpful overview of the development of NEPA. The author has drawn freely on Lieberman's insights. For an excellent analysis of the differences between private and public law models of adjudication, see Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

37. The literature on the topic is now unmanageable. The seminal work is Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). For a good (manageable) survey of the classical literature see K. CHEUNG, THE MYTH OF SOCIAL COST (1978).

38. *See* Ogus & Richardson, *Economics and the Environment: A Study of Private Nuisance*, 36 CAMBRIDGE L.J. 284 (1977); Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 STAN. L. REV. 1075 (1980).

39. Some theorists thought that classical economics *might* provide some answers, but only if "surrogates" could be found for prices. *See, e.g.*, L. TRIBE, CHANNELLING TECHNOLOGY THROUGH LAW 62-100 (1973).

States by the mid-1960's. The virtues of a new environmental ethic were recognized, but people were unsure of how it could be achieved.

Congress was left with a problem. Somehow it had to respond to the perceived deficiencies of legal and economic ordering in the environmental context, yet it lacked a suitable vehicle. To some extent the problem could have been passed down the line to other agencies in a series of specific, linear statutes, but intervention at any one point in the battle for a clean environment would have effects elsewhere in the infrastructure of the United States. The consequences could not be predicted in advance. Congress itself could not reasonably have been expected to oversee the details of an environmental clean-up. It could, however, express a national objective: that there *should be* a new environmental ethic, even if the policies needed to achieve that objective had not yet been spelled out. It was against this background that the National Environmental Policy Act (NEPA) evolved.

The chief architects of the legislation were Professor Lynton Caldwell (a professor of political science at the University of Indiana) and Senator Henry Jackson. The preliminary writings of Lynton Caldwell are of particular interest; he was critical both of the United States developmental ethic and of what he perceived as a preference for "government by Judges."[40]

The NEPA itself was preceded by several years of extensive studies. Allegations that fragmented governmental decision-making and the lack of a government leadership role on environmental questions lay at the heart of the environmental problem appeared to be the dominant themes of the resulting reports.[41]

The actual legislation started out with a modest bill written and introduced by Senator Jackson.[42] It contained no policy statements, although the Senator was known to have at least contemplated the pos-

40. *See* Caldwell, *Environment: A New Focus for Public Policy?* 23 PUB. AD. REV. 132, 137-38 (1963); L. CALDWELL, ADMINISTRATIVE POSSIBILITIES FOR ENVIRONMENTAL CONTROL IN FUTURE ENVIRONMENTS OF NORTH AMERICA 648, 666-67 (F. Darling & J. Milton eds. 1966); L. CALDWELL, ENVIRONMENT: A CHALLENGE FOR MODERN SOCIETY 99-103 (1970); Caldwell, *Authority and Responsibility for Environmental Administration*, 389 ANNALS 107, 112 (1970).

41. *See, e.g.*, STAFFS OF SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS AND HOUSE COMM. ON SCIENCE AND ASTRONAUTICS, 90th Cong., 2d Sess., CONGRESSIONAL WHITE PAPER ON A NATIONAL POLICY FOR ENVIRONMENT 18 (Comm. Print 1968). *See also* Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230 (1970); F. ANDERSON, NEPA IN THE COURTS 1-14 (1973); W. ROGERS, ENVIRONMENTAL LAW 697-704 (1977).

42. S. 1075, 91st Cong., 1st Sess. (1969).

sibility of such a provision.[43] It is difficult to determine why the original Jackson bill did not contain a policy statement; however, it has been suggested that congressional tactics might have played a large role in that the Senator probably wanted to avoid jurisdictional controversies with other powerful Senate committees.[44]

In any event, the Jackson bill went forward into committee. By then the influence of Caldwell had become overt; in hearings he argued that the legislation should contain an adequate policy statement, and provisions very similar to what is now section 101 were added.[45] But Caldwell also had a lawyer's instincts: he was concerned with how the translation of this broad and opaque set of directives into positive action was to be achieved. Thus, not long after the original bill was introduced, Caldwell began to argue for the inclusion of explicit provisions for implementation that would give it an "action-forcing, operational aspect."[46] A trigger mechanism was then evolved and added in the form of the (now) section 102.[47] This section merits close attention: in it (particularly section 102(1)(c)), the courts and the United States legal profession found the genesis of a springboard for real action on environmental questions. However, beyond the addition of section 102, there does not seem to have been any real consideration during the legislative discussion of the bill of how a coherent national policy af-

43. In the House of Representatives a similar bill was introduced which did contain a very brief general statement of policy. H.R. 6750, 91st Cong., 1st Sess. (1969).

44. F. ANDERSON, *supra* note 41, at 5-6.

45. *Hearings on National Environmental Policy before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 128 (1969).

46. *Id.* at 116.

47. The section states:

> Sec. 102 [4332] Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts.
>
> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—
>
> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;
>
> (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;
>
> (C) include in every recommendation or report on proposals for legislation

fecting many agencies was to be achieved by superimposing an idealized model of decision-making on a maze of mission-oriented agencies.

Certainly Senator Jackson perceived the difficulties with a statutory mandate of such extraordinary scope, but he claimed the procedural provisions of section 102 would carry the policies into effect:

> A statement of environmental policy is more than a statement of what we believe as a people and as a nation. It establishes priorities and gives expression to our national goals and aspirations. . . . What is involved is a congressional declaration that we do not intend, as a government or as a people, to initiate actions which endanger the continued existence or the health of mankind. . . . If there are to be departures from this standard of excellence they should be exceptions to the rule and the policy. And as exceptions, they will have to be justified in the light of public scrutiny as required by section 102.[48]

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and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) [Omitted, was added in 1969];

(E) study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by title II of this Act.

48. 115 CONG. REC. 40416 (1969).

The real question at that point was whether that optimism was justified. Would United States courts in fact come to the aid of the legislators and insist that a number of powerful, largely autonomous agencies change their ways?

The first real test of NEPA came in the context of nuclear power stations. On the effective date of the statute (January 1, 1970), the Atomic Energy Commission (AEC), predecessor to the Nuclear Regulatory Agency (NRA), was considering eighty license applications. Prior to NEPA, the AEC had not considered the environmental implication of its decisions. When NEPA came into effect, the agency amended its rules but claimed that it was not required under NEPA to review construction already underway or licensing applications already scheduled for hearing.[49] Clearly a major confrontation with environmentalists was in the offing; it came in the form of a battle over a nuclear plant at Calvert Cliffs, on the Chesapeake Bay in Maryland. A construction permit had been granted prior to NEPA's enactment; the agency refused to re-open the permit.

Ultimately the dispute reached the United States Court of Appeals, District of Columbia, in the now famous *Calvert Cliffs* decision.[50] This court has jurisdiction to pass on challenges to the rule-making activities of federal agencies. It is also an extraordinarily experienced public law court, thoroughly conversant with the nuances of government policy and decision-making.

Judge Skelly Wright, for a unanimous court, found that the AEC had fallen woefully short of the Act. In a typically forthright passage, he declared that the court has a duty "to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy. . . ."[51] He continued in a later passage:

> Section 102 duties are not inherently flexible. They must be complied with to the fullest extent, unless there is a clear conflict of *statutory* authority. Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance.[52]

The Court was careful to indicate that, although it would not intervene on the merits of a particular licensing application, it could and would

49. Calvert Cliffs Coordinating Comm. v. AEC, 449 F.2d 1109, 1119 (D.C. Cir. 1971).
50. *Id.*
51. *Id.* at 1111.
52. *Id.* at 1115.

rigorously scrutinize the agency records to see whether a decision had been reached with individual consideration and balancing of environmental factors, conducted fully and in good faith.

A landmine had exploded under all United States federal agencies. Somehow a vague statement in a statute had transmuted; the lawyer's historic ploy had succeeded, and substance had once again become secreted in the interstices of procedure. United States federal agencies would now be required to hold extensive, carefully recorded hearings, to compile in-depth reports articulating the advantages and disadvantages of a particular course of action, and to defend their choice of action as rational.

The next broad issue was whether the hard-look doctrine and the heavy affirmative burden the courts had cast on these agencies would prove too onerous. Some effects were obvious and measurable. Within three years, the AEC's staff doubled to 1,200, and its regulatory budget increased from $15.7 to $46.5 million. One hundred and ten nuclear plants were affected, and no new licenses were issued for almost two years as new hearings were held.[53] Literally hundreds of court cases were mounted, most of them attacking the adequacy of environmental impact statements for particular plants.

The decisions were unremittingly rigorous. An agency could not disregard an alternative solution simply on the basis that it would prove less effective than the preferred course; an agency had to actively seek out alternatives, even alternatives that it had no power to enforce.[54] Yet United States courts stood steadfast on the principle that they would not themselves be drawn into decisions on the merits. The question was always how well the agencies had done their homework in light of the declared provisions of section 101. The courts and Congress had, at least temporarily, formed an alliance.

A cry, characterized by the Wall Street Journal as "beserk proceduralism," was raised.[55] The economic costs of compliance with this Act and the Administrative Procedure Act (which governs agency hearing procedures) were alleged to be staggering.[56] It was argued that

53. J. LIEBERMAN, *supra* note 36, at 102.

54. *See, e.g.*, Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 834-35 (D.C. Cir. 1972).

55. "When we wonder why we have an energy problem, or why economic growth fails to meet our hopes, we ought to notice that we are being bled to death by berserk proceduralism." Wall. St. J., Feb. 24, 1978, at 10.

56. The Administrative Procedure Act is now codified in 5 U.S.C. §§ 551 *et seq.* On the question of economic costs, see B. LIPPKE, THE IMPACT OF POLLUTION STANDARDS ON SHORTAGES, INFLATION, REAL INCOME AND UNEMPLOYMENT (1975); *Economic Impact of*

lawyers' values had hopelessly transcended sensible and fair administrative values.

Inevitably, a major review of the entire issue was brought to the United States Supreme Court in 1978 in *Vermont Yankee*,[57] another nuclear station case. There had been great concern over nuclear waste disposal. The Nuclear Regulatory Agency (NRA) finally decided to hold a generalized rule-making hearing on the rules for waste disposal, rather than dealing with each case in the future on an ad hoc basis. In accordance with the Administrative Procedure Act, the NRA gave notice and received staff and outside comments. It relied primarily on an internal waste management report in concluding that the risks posed by nuclear waste are minimal and issued a permit. But the agency severely restricted the opportunities for intervenors to get at the agency reports, for example, by cross-examination. The intervenors succeeded in reaching the federal appellate court level on the ground that the issue had not been sufficiently aired. The United States Supreme Court decision appeared at first blush reactionary and a severe blow to environmentalists: it labelled as "Kafkaesque" a judicial philosophy which permits judges to nullify the results of exhaustive administrative proceedings on the ground that the agency failed to follow procedures called for by no explicit statutory provision.[58] It said that the courts cannot superimpose procedural steps above those statutorily required.[59] Given previous victories, environmental groups were shocked by the decision. Yet *Vermont Yankee* appears merely to have refined, not stopped, the stream of attacks on the adequacy of particular impact statements.

A development which would potentially have much greater impact than *Calvert Cliffs* and its progeny, even as modified by *Vermont Yankee*, is the so-called "Bumpers Amendment" to the Administrative Pro-

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Environmental Regulations on the United States Copper Industry (prepared for the U.S. Environmental Protection Agency, 1978); *Council on Environmental Quality, Ninth Annual Report* (1978); F. ANDERSON, A. KNEESE, P. REED, S. TAYLOR & R. STEVENSON, ENVIRONMENTAL IMPROVEMENT THROUGH ECONOMIC INCENTIVES (1977) [hereinafter cited as ANDERSON & KNEESE].

57. Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, 435 U.S. 519 (1978). The commentary on the case is now extensive. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.: Three Perspectives*, 91 HARV. L. REV. 1804 (1978); Rodgers, *A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny*, 67 GEO. L.J. 699 (1979); *Symposium: A Comparative Analysis of Vermont Yankee*, 55 TUL. L. REV. 418-82 (1981).

58. 435 U.S. at 543-48.

59. *Cf.* Furnell v. Whangarei High Schools Board [1973] A.C. 660 (N.Z.P.C.).

cedure Act.[60] There is a long-established principle of United States administrative law that has heretofore accorded a presumption of regularity to the rule-making activities of agencies. The theory is that since Congress has delegated rule-making power to the agencies, the author of the rules should be the agencies, not the courts. The Bumpers Amendment would reverse the position. When an agency action is challenged, a reviewing court would be required to determine whether the particular action is authorized "by the language of the statute" or by "other evidence of ascertainable intent."[61]

There is no doubt as to what inspired the amendment: it was a congressional response to concerns about over regulation and widespread criticism of the flood of legislative-type ordinances emanating from agencies.[62] The result, in practice, of passage of the Bumpers Amendment would be closer judicial scrutiny of environmental (and other) regulations. Several respected United States commentators have expressed grave concern about this potential development. The tone of the commentary seems almost universally to be that Bumpers is a congressional *avoidance* device and that the real cure would be more precise legislative standard-setting.[63]

What then can be said of the NEPA experiment? First, on the whole the decisions have conformed to what Congress asked as a matter of policy in 1969: that major agencies responsible for particular actions be required to stop and think through, in environmental terms, the consequences of any particular action before it is undertaken. Also,

60. The proposal was introduced in 1975 as S. 2408, 94th Cong., 1st Sess. (1975). It was adopted by the Senate in 1979 as an amendment to the Federal Courts Improvement Act, S. 1477; *see* 125 CONG. REC. S12,145-67, S12,172-72 (daily ed. Sept. 7, 1979). The bill died in the House Judiciary Committee but was passed as an amendment to a bill creating a Court of Appeals for the Federal Circuit, by the House of Representatives late in 1980. *See* amend. 1701 to H.R. 3806 (126 CONG. REC. S13,877 (daily ed. Sept. 30, 1980)). That bill was then withdrawn from the Senate calendar (125 CONG. REC. S12,879-80). The fate of the bill still seems uncertain.

61. Amendment 1701 to H.R. 3806, *supra* note 60.

62. *See* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975); Gellhorn & Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771 (1975); Dixon, *The Independent Commissions and Political Responsibility*, 27 AD. L. REV. 1 (1975); Pedersen, *Decline of Separation of Functions in Regulatory Agencies*, 64 VA. L. REV. 991 (1978); Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 521 (1977); Nathanson, *Separation of Powers and Administration Law: Delegation, the Legislative Veto, and the "Independent" Agencies*, 75 NW. L. REV. 1064 (1981).

63. *See* Woodward & Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 AD. L. REV. 329 (1979); Note, *Judicial Review of Agency Rule Making*, 14 GA. L. REV. 300 (1980); McGowan, *supra* note 17; Ginsburg, *supra* note 8.

the stand taken by the courts, in the main, reflects a clear appreciation of the stated congressional objectives. In retrospect, the unlikely combination of a bland motherhood set of objectives and an obscure procedural provision has been welded by astute judges into a very powerful combination. However, had the policy provisions of the statute stood alone, it seems unlikely that the experiment would have succeeded.

There is a second significant theme. United States courts have been more faithful to the congressional statement of objectives in this area than have the agencies affected. It seems a reasonable conclusion that the various United States agencies would have watered down the new ethic, or avoided it altogether, had it not been for the strong stand taken by the Court of Appeals for the District of Columbia. Through the astute exercise of judicial craftsmanship, United States federal courts avoided being drawn into the merits of particular controversies and upheld the integrity of a real, if seemingly vague, policy statement. United States courts, in effect, acted as competent midwives to a particularly troublesome birth. The birth might not have been accomplished without them, or at least the progeny would probably have suffered from severe disabilities.

V. THE BROADCASTING ACT—CANADA

Canadian public policy problems are extraordinarily complex and involve a series of paradoxes. The country is one of the largest geographic areas in the world, but has a relatively small population of approximately twenty million, concentrated in a string of cities just north of the United States border. Canada has vast resources, is under capitalized, and yet is still one of the most technologically advanced societies in the world. Its constitutional framework is an oddity. In addition to this curious potpourri, Canada has to deal with all the difficulties of "two solitudes"[64] (French and English cultures) existing side by side. As if that combination were not difficult enough for a common law legal system to confront, the forces of history chose to place Canada adjacent to the United States of America. The result has been, in crude economic terms, that a Mom-and-Pop store has had to exist alongside a supermarket. Canadian legislators have had to refine the art of compromise, and it should come as no surprise that Canadian federal law draftsmen have been confronted with the unenviable task of translating such compromises into workable legislation.

64. The term comes from the title of the 1945 novel by H. MACLENNAN, TWO SOLITUDES.

There is a series of Canadian federal statutes and bills, drafted in the late 1970's, which contain national objectives of an overarching character.[65] It is not apparent from public records why several major federal statutes having this characteristic were all initiated within a comparatively short period of time. All have decidedly nationalistic overtones; all are to some extent aimed at (perceived) Canadian/United States problems. Furthermore, this group of statutes and bills has had the effect of strengthening the hand of the federal government in directing the critical elements of the nation's infrastructure: transport, energy, telecommunications, and foreign investment. It can presently only be a matter of speculation as to what extent this endeavour was a deliberate attempt (short of constitutional re-negotiation) to reinforce a centralized political power base in key sectors. The kind of documentation necessary to support that thesis, if it is to be maintained at all, will have to await other researchers on some other occasion. A review of Canadian broadcasting legislation seems to have been part of the larger package of bills, but the evolution and framework of broadcasting legislation in Canada is sufficiently instructive in its own right to merit inclusion here.

The first radio station in Canada began transmitting in Montreal in 1919. By 1929 Canadian legislators were faced with several difficult, interdependent issues. There was international chaos over frequency allocation in the 1920's. A Canadian response was needed to an international problem. At the North American level, there was perhaps even greater chaos. There was no effective controlling legislation in the United States over its operators, and no international agreement between the two countries. Negotiations between Ottawa and Washington had broken down altogether over channel frequency allocations. The United States broadcasting industry posed a real dilemma for Canadian as well as American legislators. At that time the United States broadcasting industry was coming under network domination, vertical integration was giving the industry monopolistic characteristics, and some key Canadian stations were looking to affiliate with United States networks. Canadian channels were being subjected to invasion by American airwaves, which triggered the concern with cultural and technological sovereignty that still haunts Canadian policy-makers and public debates in Canada. At the domestic level, there was a debate in the late 1920's in Canada over religious broadcasting. The Jehovah's Witnesses had their own licensed operations, and renewals of licenses

65. See note 25 *supra*.

were refused. This generated fierce public controversy over religious censorship. Thus Canadian legislators faced international, technical, and commercial chaos, as well as allegations of improper censorship.[66]

The result, inevitably, was an inquiry in the form of a Royal Commission.[67] This Commission (commonly referred to as the "Aird Commission") recommended a broadcasting model somewhat along British lines: a publicly owned and controlled system, with stations across the country giving bilingual service. The necessary revenues were to be met by license fees, advertising, and federal subsidies, and heavy emphasis was to be placed on programs from Canadian sources.

Ultimately, the general conclusions of the Aird Commission became the 1932 Canadian Radio Broadcasting Act.[68] The Prime Minister stated the following during the debate on the bill:

> First of all, this country must be assured of complete control of broadcasting from Canadian sources, free from foreign interference or influence. Without such control radio broadcasting can never become a great agency for communication of matters of national concern and for the diffusion of national thought and ideals, and without such control it can never be the agency by which national conscious-

66. There is a rich literature on the evolution of Canadian broadcasting and media. Professor Frank Peers, Professor of Political Economy at the University of Toronto, has written two invaluable works: THE POLITICS OF CANADIAN BROADCASTING 1920-1951 (1960) and THE PUBLIC EYE: TELEVISION AND THE POLITICS OF CANADIAN BROADCASTING 1952-1968 (1979). *See generally* Prange, *The Origins of Public Broadcasting in Canada*, 46 CAN. HIST. REV. 1 (1965); E. WEIR, THE STRUGGLE FOR NATIONAL BROADCASTING IN CANADA (1965); D. ELLIS, EVOLUTION OF THE CANADIAN BROADCASTING SYSTEM: OBJECTIVES AND REALITIES (1979); R. BABE, CANADIAN TELEVISION BROADCASTING STRUCTURE, PERFORMANCE AND REGULATION (1979); W. STANBURY, STUDIES ON REGULATION IN CANADA (1978); T. (GREG) KANE, CONSUMER AND REGULATORS: INTERVENTION IN THE FEDERAL REGULATORY PROCESS (1980); R. SCHULTZ, FEDERALISM AND THE REGULATORY PROCESS (1979); THE REGULATORY PROCESS IN CANADA (G.B. Doern ed. 1978); C. JOHNSTON, THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION (Law Reform Commission of Canada, 1980).

For recent economic analyses of Canadian broadcasting see S. MCFAYDEN, C. HOSKINS, GILLEN, CANADIAN BROADCASTING: MARKET STRUCTURE & ECONOMIC PERFORMANCE (1980); R. BABE, CABLE TELEVISION AND TELECOMMUNICATIONS IN CANADA: AN ECONOMIC ANALYSIS (1975).

On United States-Canada relations regarding communications, see E. FELDMAN & NEVITTE, THE FUTURE OF NORTH AMERICA: CANADA, THE UNITED STATES & QUEBEC NATIONALISM (1979), ch. 5.

On the information revolution in Canada, see SERAFINI & ANDRIEU, THE INFORMATION REVOLUTION AND ITS IMPLICATIONS FOR CANADA (1980); CUNDIFF & REID, ISSUES IN CANADIAN/U.S. TRANSBORDER COMPUTER DATA FLOWS (1979).

67. ROYAL COMMISSION ON BROADCASTING, REPORT (1929).

68. 1932, ch. 51.

> ness may be fostered and sustained and national unity still further strengthened. . . .
>
> Secondly, no other scheme than that of public ownership can ensure to the people of this country, without regard to class or place, equal enjoyment of the benefits and pleasures of radio broadcasting. . . .
>
> Then there is a third person. . . . The use of the air . . . that lies over the soil or land of Canada is a natural resource over which we have complete jurisdiction under the recent decision of the privy council [and] I cannot think that any government would be warranted in leaving the air to private exploitations and not reserving it for development for the use of the people.[69]

The legislation was doomed from the outset. The Commissioners had a difficult dual role: they had to run a national service and at the same time *regulate* the private sector stations. The Commission was politically vulnerable, inadequately funded, and lacked managerial expertise.[70]

As a result, new legislation was enacted in 1936[71] which created the Canadian Broadcasting Corporation (CBC). This entity also had a dual role: to provide a national radio service *and* to regulate all broadcasting in Canada. This rather curious structural arrangement was an offshoot of the Canadian belief in a single system of broadcasting. That is, both public and private enterprise elements were to be allowed, but the regulator of both was to be the entity having legislative responsibility for the public sector and the system as a whole.

Neither the 1933 nor the 1936 statute contained a purpose clause, much less a set of policy objectives; both statutes followed the spartan, traditional format.

From 1936 to 1958, a debate continued in Canada about the respective roles of public and private broadcasting and the proper role of regulation *per se*, both domestically and vis-a-vis United States programming.[72] The private sector, in general, sought less regulation and repeatedly expressed its disaffection at the dual role of the CBC. The CBC, predictably, sought to enlarge its role.

The constitutional position as to regulation of radio communications in Canada under the (then) current Canadian constitutional char-

69. House of Commons Debates, May 18, 1932.

70. *See* F. PEERS, *supra* note 66; D. ELLIS, *supra* note 66.

71. 1 Edw. 8, c. 24 (1936).

72. *See* E. WEIR, *supra* note 66; D. ELLIS, *supra* note 66.

ter—the British North America Act[73]—was resolved in 1932. The International Radio Telegraph Convention of 1927,[74] to which Canada was a signatory, required that assignment of radio frequencies be by statute. The Privy Council in London (which was then the terminal appeal court for Canadian constitutional matters) held that federal jurisdiction existed by virtue of both the federal power over peace, order, and good government and the federal power over inter-provincial undertakings.[75] The hertzian spectrum was considered, for this later purpose, to be an indivisible undertaking.

The statutory structural framework of Canadian broadcasting, however, was not reorganized until 1958, when a new statute[76] was passed which retained the concept of a single system but disengaged the CBC from a regulatory role over that system. Under the new statute, the Board of Broadcast Governors, an independent entity, became the regulatory body.

Television, rather than radio, became the major cause of concern after World War II. Hence the questions of the structural framework and regulation of broadcasting became the subject of a renewed series of commissions and inquiries.[77] Perhaps the most important of these for the purpose of this Article was an advisory committee to the federal Secretary of State under the chairmanship of Robert Fowler.[78]

The Fowler Committee contended that the problems associated with Canadian broadcasting were *not* structural but related rather to inadequate goal formulation on the part of Parliament itself:

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73. The British North America Act and its amendments are set out in CAN. REV. STAT. 1970, App. II. *See also* A CONSOLIDATION OF THE BRITISH NORTH AMERICA ACTS 1867 TO 1975 (E. Driedger ed. 1976).

74. Nov. 25, 1927, 45 Stat. 2760, T.S. No. 767, 84 L.N.T.S.

75. Re Regulation and Control of Radio Communication in Canada [1932] A.C. 304 (P.C.). *See also* MacPherson, *Economic Regulation and the British North America Act: Labatt Breweries and Other Constitutional Imbroglios*, 5 CAN. BUS. L.J. 172 (1981). Brait, *The Constitutional Jurisdiction to Regulate the Provision of Telephone Services in Canada*, 13 OTTAWA L. REV. 53 (1981); Kaiser, *Competition in Telecommunications: Refusal to Supply Facilities by Regulated Common Carriers*, 13 OTTAWA L. REV. 95 (1981); Kane, *The New CRTC Telecommunications Rule of Procedure: A Practitioner's Guide*, 12 OTTAWA L. REV. 393 (1980).

76. 7 Eliz. 2, c. 22 (1958).

77. *E.g.*, CANADA, COMMITTEE ON BROADCASTING, REPORT (1965) [hereinafter cited as the FOWLER COMMITTEE]; CANADA, ROYAL COMMISSION ON BROADCASTING, REPORT (1957) (usually referred to as the Fowler Commission); CANADA, ROYAL COMMISSION ON NATIONAL DEVELOPMENT IN THE ARTS, LETTERS & SCIENCES, REPORT (1951) (usually referred to as the Massey Commission); CANADA, SPECIAL SENATE COMMITTEE ON MASS MEDIA, MASS MEDIA 1970 (1970); CANADA, ROYAL COMMISSION ON GOVERNMENT ORGANIZATION, REPORT (1963) (usually referred to as the Glassco Commission).

78. FOWLER COMMITTEE, *supra* note 77.

> In the past, Parliament has not stated the goals and purposes for the Canadian broadcasting system with sufficient clarity and precision, and this has been more responsible than anything else for the confusion in the system and the continuing dissatisfaction which has led to an endless series of investigations of it.[79]

Fowler went further: the statutory provisions neither specified the goals for the broadcasting system nor did they provide for their attainment.[80] In addition, the existing statutory provisions were "remarkably unclear in defining the continuing relationship between the agencies of control and Parliament."[81]

The Fowler Committee made a number of specific recommendations. The most important were:

> Parliament should state firmly and clearly what it expects the broadcasting system to be and do; and should set explicit goals, for both the public and private sectors of Canadian broadcasting, in the Broadcasting Act and more fully in a White Paper on broadcasting policy. . . . [T]he administration, control and direction of the national broadcasting system, in accordance with the goals defined, should be delegated to an independent board of authority.[82]

The position of the CBC had always been statutorily ambivalent: role model *and* regulator. The Committee was again, in this dimension, critical of the failure of Parliamentary objectives:

> The Broadcasting Act of 1958 is remarkably terse in stating the objects and purpose of the CBC. The Act contains some necessarily long and dull sections defining the structure of the Corporation and its rights and powers. But when it comes to expressing the essential purpose of the CBC, the Act uses only five words. Section 29 states that the Corporation is established for the purpose of 'operating a national broadcasting service.' In sixteen lengthy sections dealing with the CBC, this is all the guidance given to those charged with the responsibility for administering the public broadcasting agency . . . If the interpretation [of this purpose] has failed to conform to the wishes of Parliament, it is clear where the responsibility rests.[83]

In the case of the CBC, the Fowler Committee also recommended that the CBC's mandate "be clearly stated and defined as fully as possible by legislation . . . and . . . expanded and specifically explained in

79. *Id.* at 91.
80. *Id.* at 88-89.
81. *Id.* at 89.
82. *Id.* at 94.
83. *Id.* at 123-24.

a White Paper on broadcasting policy."[84]

The Fowler report was never the subject of specific legislation, but in Canada it seems to have introduced the idea of entrenching declaratory statements of objectives into enabling legislation.

The 1968 Broadcasting Act[85] was the first enactment in this area in Canada to have extensive declaratory provisions. Section 3 (as finally enacted) provided:

> 3. It is hereby declared that
> (a) broadcasting undertakings in Canada make use of radio frequencies that are public property and such undertakings constitute a single system, herein referred to as the Canadian Broadcasting system, comprising public and private elements;
> (b) the Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada;
> (c) all persons licensed to carry on broadcasting undertakings have a responsibility for programs they broadcast but the right to freedom of expression and the right of persons to receive programs, subject only to generally applicable statutes and regulations, is unquestioned;
> (d) the programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing views on

84. *Id.* at 126.

85. CAN. REV. STAT. c. B-11. Some sense of the background to this statute can be gained from the memoirs of Judy La Marsh, who was Secretary of State at the time the legislation was being prepared:

> The Broadcasting Act plodded through all stages of Cabinet Committee, and then on to the full Cabinet. That sentence is written quickly, but the legislation wasn't so quick getting over the hurdles. By that time, in my Department at least (and probably many others, including the lawyers from the Justice Department who drafted, redrafted and drafted yet again) we were sick to death of the whole matter and would gladly have forgotten it. The Bill was finally printed and ready for the Cabinet's consideration. When it arrived there, most of the ministers couldn't care less. They didn't read it and sat through explanation and discussion with their minds on other things in their own departments. Not so Maurice Sauve [Minister of Forestry, whose wife was subsequently to become Minister of Communications], who was determined to show the scope of his knowledge and intelligence in broadcasting as well. At this late state he came up with the idea of splitting the CBC into programme-making and facilities-building halves and argued loud and long about it, blithely waving off the year and a half of Government study and work, its tabled White Paper, not to speak of the interminable and repeated prior investigations and reports from within and without the House. After he had had his lengthy say, the Bill as presented by [the Cabinet] Committee was approved.

J. LA MARSH, MEMOIRS OF A BIRD IN A GILDED CAGE 262-63 (1969).

matters of public concern, and the programming provided by each broadcaster should be of high standard, using predominantly Canadian creative and other resources;

(e) all Canadians are entitled to broadcasting service in English and French as public funds become available;

(f) there should be provided, through a corporation established by parliament for the purpose, a national broadcasting service that is predominantly Canadian in content and character;

(g) the national broadcasting service should

(i) be a balanced service of information, enlightment and entertainment for people of different ages, interests and taste covering the whole range of programming in fair proportion,

(ii) be extended to all parts of Canada, as public funds become available,

(iii) be in English and French, serving the special needs of geographic regions, and actively contributes to the flow and exchange of cultural and regional information and entertainment, and

(iv) contribute to the development of national unity and provide for a continuing expression of Canadian identity;

(h) where any conflict arises between the objectives of the national broadcasting service and the interests of the private element of the Canadian broadcasting system, it shall be resolved in the public interest but paramount consideration shall be given to the objectives of the national broadcasting service;

(i) facilities should be provided within the Canadian broadcasting system for educational broadcasting; and

(j) the regulation and supervision of the Canadian broadcasting system should be flexible and readily adaptable to scientific and technical advances;

and that the objectives of the broadcasting policy for Canada enunciated in this section can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority.

Five different preliminary versions of this legislation were prepared through 1967. Three versions were prepared for cabinet committees. Bill C-163 was the first version to be read in the House, and as amended became the 1968 Act.[86]

It is important to establish the source of the objectives and policies of the Broadcasting Policy set out in section 3 of the Act. Was there a coherent, externally evolved plan, or were there a series of com-

86. See note 85 *supra*.

promises which could lead to later difficulties? A review of the drafts shows that new statements were added to the prospective section 3 as it evolved through the drafting process. These additions brought with them their own conflicts and compromises.

The language in section 3(d) concerning the "reasonable opportunity for the expression of conflicting views on matters of public controversy" apparently was added as a result of a committee report issued following an unrelated review of controversy over a current affairs program which had attracted widespread political attention.[87] The statement that the national service should extend to all parts of Canada was a direct reflection of an earlier White Paper promise that the government should give "the highest priority to the extension of radio and television coverage" through provision of funds to the CBC for this purpose.[88] The objectives of the CBC contributing to "national unity" came from the CBC's own (arguably self-serving) conception of its mandate as expressed by the CBC to the Fowler Committee: "It [the CBC] should serve Canadian needs and bring Canadians in widely separated parts of the country closer together, contributing to the development and preservation of a sense of national unity. It must provide for a continuing self-expression of the Canadian identity."[89] Finally, section 3(h), providing that national service goals must prevail in the case of conflict between private and public sector, clearly came from the Fowler report, as restated in the 1966 White Paper.[90]

What does all this indicate? First, nothing was being said in section 3 that had not been said by some official report or inquiry before the Act was drafted. Nevertheless, conflicts between possible objectives that had been suggested prior to the legislation were carried forward into the Act. Second, there was no real discussion at the time these objectives were discussed as to their attainability. A perusal of the House of Commons debates indicates bland acceptance of the "apple pie and motherhood" statements in section 3 but no real appreciation of the economic, public administration, and legal problems that would have to be confronted in attempting to implement these ambitious objectives. Third, the trigger mechanism for implementation in this case—although it was not discussed in those terms—was seen to be the

87. There had been public controversy over a current affairs program called "Seven Days." *See* F. PEERS, THE PUBLIC EYE: TELEVISION AND THE POLITICS OF CANADIAN BROADCASTING, *supra* note 66, at 389.

88. CANADA, SECRETARY OF STATE, WHITE PAPER ON BROADCASTING (1966).

89. FOWLER COMMITTEE, *supra* note 77, at 124.

90. CANADA, SECRETARY OF STATE, *supra* note 88.

regulatory agency, the Canadian Radio Television Commission (CRTC). Although the Act purported to present the CRTC as an "independent" regulatory body, a critical difficulty existed. Section 23 of the 1968 Act enabled the Governor-in-Council (in reality, the Cabinet) to intervene *after* the event with respect to a decision of the Commission and to "set aside" or "confirm" that decision. Not only was the CRTC to have the onerous task of overseeing these broad objectives; it was also to be simultaneously subject to the whims of political scrutiny. Fourth, under the 1968 Act the CRTC was only empowered to regulate "broadcasting"; other telecommunication common carriers were regulated by the Canadian Transport Commission under the (then) National Transportation Act and the Railway Act.[91]

The structural position was hopelessly complicated. Difficulties in interpretation arose under the various statutes as the new interactive telecommunication modes came on stream. Federal-provincial tensions over control of both carriage and content with respect to telecommunications (particularly cable TV) began to emerge. Quebec saw control over programming as vital to the preservation of its cultural heritage. The ever-present "threat" of Canadian programming being submerged in a flood of United States originated programs became even more pronounced with the advent of multi-channel Direct Broadcasting Satellites, and there was outright warfare between Canada-United States border stations.

Beyond these difficult issues an even more ominous problem loomed: how should the modes of information and dissemination be controlled—if they were to be formally controlled—in an economy which was growing toward Daniel Bell's construct of a post-industrial economy?[92] Finally, these issues were being debated against the backdrop of an antiquated, uncertain constitutional framework.[93]

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91. National Transportation Act, CAN. REV. STAT. c. 69, § 2 (1966-67); Railway Act, CAN. REV. STAT. c. 234, § 1 (1970).

92. D. BELL, THE COMING OF POST INDUSTRIAL SOCIETY (1973); Hammond, *Quantum Physics, Econometric Models and Property Rights to Information*, 27 MCGILL L.J. 47 (1981).

93. The Canadian Federal Liberal Administration introduced a Resolution into the House of Commons on Feb. 13, 1981 (amended in House of Commons, April 23, 1981 and by the Senate on April 24, 1981) which, if approved by Parliament, and subject to the repeal of the existing B.N.A. Act (see n. 73 *supra*) by the British Parliament, was to give Canada a completely new constitutional framework. The constitutionality of the Federal government's attempt at constitutional patriation (absent the consent of *all* the Provinces in the Confederation) was passed upon by the Supreme Court of Canada in judgments with respect to a series of cases on September 28, 1981. The cases were references under S. 55(1) of the Supreme Court Act., CAN. REV. STAT. c. 259 (1970). They are reported as Constitutional Amendment References 1981, 39 N.R. 1-307 (1981). The British Parliament repealed the

In the end, the Federal government was driven to act. A Telecommunications Bill was introduced but has not yet been enacted.[94] The avowed aim of this legislation is to make federal regulation of telecommunications more responsive to technological changes and to provincial concerns. Structurally, the bill aims to replace with a single statute the Broadcasting Act, the Telegraphs Act, the CRTC Act, the Radio Act, and those portions of the Railway Act and the national Transportation Act which apply to telecommunications. The CRTC would continue to be the regulatory authority, while the CBC would continue to have statutory authority for a bilingual national radio and television service.

The Bill has three features of particular interest. First, the "objectives" section is extended in scope.[95] Second, the federal government is empowered to enter into agreements with provincial governments and to authorize the sharing of some federal regulatory functions with provincial agencies.[96] Third, the bill empowers the Governor-in-Council (Cabinet) to issue broad policy directives to the CRTC with respect to national telecommunications policy.[97] The bill would *not*, however, allow the Cabinet to issue directions to the CRTC with respect to the issue, amendment, or renewal of *particular* broadcasting licenses, the content of programming, the application of standards of quality to programming, or the restriction of freedom of expression.[98]

As to the statutory objectives in section 3 of the Telecommunications Bill, several elements were added. First, it is asserted that "efficient telecommunication systems are essential to the sovereignty and integrity of Canada, and telecommunication services and production resources should be developed and administered so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada."[99] This was a clear response to concerns addressed shortly before the bill was drawn.[100] The prospective section 3(a) is a critical provision and could provoke real debate if the bill proceeds. It extends

B.N.A. Act. Hence Canada is now autonomous in constitutional matters. The current constitution is in The Constitution Act, 1982.

94. The latest version is 27 CAN. STAT. C-16, 4th Sess., 30 Parliament 1978.

95. *Id.* cl. 3.

96. *Id.* cl. 7.

97. *Id.* cl. 9.

98. *Id.* cl. 9(2).

99. *Id.* cl. 3(a).

100. *See* CONSULTATIVE COMM. ON THE IMPLICATIONS OF TELECOMMUNICATIONS FOR CANADIAN SOVEREIGNTY, TELECOMMUNICATIONS AND CANADA (1979) (usually referred to as the Clyne Committee). *See also* Swinton, *Advertising & Cable Television—A Problem in International Communications Law*, 15 OSGOODE HALL L.J. 543 (1977).

the historic thesis of Canadian broadcasting beyond radio and television and into the new interactive telecommunications technologies generally. Apparently, these new technologies are to be pressed into the service of "Canadianism" and the cultural glue theory. This difficult provision also cuts across the debate over a new international information order. Moreover the use of the word "efficient" in the subsection poses a serious dilemma. "Efficiency" is a word with well-understood technical (economic) dimensions. This is the sort of ambiguity which has so bedevilled legislation of this kind. Does the term have the usual technical economic meaning, or is it to be understood as reading "technologically efficient" or even taken in some socio-cultural sense?

Other new provisions in section 3 stress the need for better service to remote areas[101] and for "equitable" broadcasting receiver rates.[102] A final "sweeper" provision requires that "the regulation of all aspects of telecommunication in Canada should be flexible and readily adaptable to cultural, social and economic change and to scientific and technological advances, and should ensure a proper balance between the interests of the public at large and the legitimate revenue requirements of the telecommunication industry."[103]

How have the courts and regulators fared under this complex body of legislation? Were these statutory objectives prayed in aid? How were they treated? These questions are best posed in the particular context of the four critical elements in the overall system: the CBC, the CRTC, the Courts, and the private sector.

The CBC always believed in its role in this system. It has influenced the objectives; to command "cultural sovereignty" as the touchstone to the CBC was to preach to the converted. The CBC has attracted much criticism over the years, not least as a result of a CRTC *Special Report on Broadcasting in Canada (1968-78)*[104] which established that, despite the objectives spelled out in the Act, the overall audience share for Canadian programming in prime time of all Canadian and United States English language television stations was only 29%.[105] Most fair-minded and informed observers have, however, conceded that the CBC faced monumental difficulties in the face of the

101. Telecommunications Bill, *supra* note 94, cl. 3(c)-(d).

102. *Id.* cl. 3(i).

103. *Id.* cl. 3(r).

104. MINISTRY OF SUPPLY AND SERVICES, SPECIAL REPORT ON BROADCASTING IN CANADA (1968-74).

105. *Id.*

statutory objectives.[106] The real difficulty was (and still is) that the enacted legislation flew and continues to fly in the face of economic reality and arguably socio-cultural reality. The CBC's mandate is to produce and disseminate quality Canadian programs, but it has to compete with United States mass-market-targeted, network-derived programs. The CBC is statutorily required to operate as a self-sustaining Crown Corporation[107] but in fact derives only 20% of its revenues from advertising. The balance of its funding comes from federal sources. The private sector in Canadian broadcasting, by way of contrast, has flourished by ignoring the statutory objectives. For instance, CTV, the major private network, whose programming was available to 92% of the Canadian population by 1977, was still showing only 6% Canadian content during the prime viewing slots (8 p.m. to 10:30 p.m.). Most of its prime-time offerings were American. The total viewing time of the CTV network allocated to Canadian programs in 1976 was less than 20%.[108]

Why should this imbalance have occurred in the face of the express statutory objectives? Two explanations might be sustained. First, the objectives were founded upon concepts which had no basis whatsoever in economic reality. Second, the CRTC, as a regulatory body, has failed to face up to the objectives of the legislation.

As to the economic question, television (the main object of concern) is primarily an entertainment medium. Increasing budgets for entertainment adds to profits; increasing budgets for news programming reduces profits. Adding relatively expensive Canadian programming decreases profits while adding less expensive local programming cuts expenses and increases profits. An extra hour per day of prime-time Canadian programming would roughly double the expenses of an average Canadian television station.[109]

The regulator, the CRTC, has come in for severe and probably justified censure for failing to enforce the statutory objectives more

106. See note 66 *supra*.

107. The CBC is a Schedule D entity under the Financial Administration Act, CAN. REV. STAT. c. 116, § 1. The role and management of Crown Corporations is under review in Canada. *See* MINISTRY OF SUPPLY AND SERVICES, CROWN CORPORATIONS: DIRECTION, CONTROL, ACCOUNTABILITY (1977); Note, *Direction, Control and Accountability of Crown Corporations: Review and Analysis of Government Proposals*, 17 OSGOODE HALL L.J. 193 (1979).

108. These statistics are derived from the REPORT in note 104 *supra*, and An Analysis of Parliament's Objectives for Canadian Broadcasting (G. Hammond, W. MacKay & M. Davidson ed.) (unpublished manuscript, Federal Department of Communications, Ottawa, 1981).

109. *Id. See also* S. MCFAYDEN, *supra* note 66.

stringently through the applications that come before it. There is now a respectable body of case law and commentary on the operations of the CRTC in Canada.[110] Criticisms of that regulatory body fall under four broad categories:

(a) That the Commission has shown little interest or expertise in economic matters.

(b) That capture theory has applied to the CRTC. It has become set in a protectionist and promotional mold vis-a-vis established media interests.

(c) That the CRTC has not been severe enough in the license renewal process.[111] The argument is that promises made by license applicants to obtain access to public airways are not kept, but substantial profits are nevertheless made, and these "free-riders" then become intervenors claiming "economic detriment" against subsequent applicants. In short, the CRTC is said to be enforcing de facto private property rights in the radio spectrum: the very thing the legislation denies.

(d) That procedures evolved by the CRTC have cut across effective provincial government input.[112]

By far the most visible and controversial aspect of the CRTC's operations—and the defense usually raised by that organization—has been the impact of political intervention into CRTC policy and decision making. The Federal Cabinet has in fact intervened under the powers contained in section 23 of the Act.[113] Strained relations between the Federal Department of Communications, the CBC, and the CRTC have been obvious on occasion.

In retrospect, it is not easy to ascribe particular reasons to the performance failure (when judged against the statutory objectives) of the Canadian broadcasting industry. Setting aside the difficult question of whether socio-cultural objectives can successfully be imposed, the possibilities seem to include a statute which misconceived the economics of Canadian broadcasting, a less than adequate performance from the

110. R. BABE, *supra* note 66; R. SCHULTZ, *supra* note 66; S. MCFAYDEN, *supra* note 66.

111. Closely documented inquiries into the license renewal process in Canada have been made. R. BABE, *supra* note 66.

112. R. SCHULTZ, *supra* note 66, has documented this complaint.

113. *See Fed. Dep't Comm., Statement by the Minister of Communications in Respect of an Order in Council to Vary CRTC Decision 77-10 and to Approve a Proposed Agreement for Membership by Telestat Canada in the Trans-Canada Telephone System*, Nov. 3, 1977, at 2. This case is usually referred to as the Telestat Case. This case, and other instances of cabinet interference, are noted by C. JOHNSTON, *supra* note 66, at 84-89.

"independent" regulatory agency, and the tensions and distortions created by political intervention in the whole process.

Canadian broadcasting legislation has been before the regular courts (as opposed to the CRTC's internal licensing hearings) less frequently than might have been expected in such a high-profile sector, and the critical litigation has been aimed at the contentious threshold question of the federal "right" to regulate telecommunications generally. An analysis of the judicial decisions concerning the section 3 objectives and the CRTC and its role—indeed of the Act as a whole—indicate concentration on such matters as constitutional disputes,[114] the role and powers of the CRTC,[115] freedom of expression,[116] and the effect of broadcasting upon the fabric of the nation.[117]

Federal control has been asserted over cable operators (notwithstanding their omission from the legislation) on the basis that their operations form part of a single undertaking of cable and hertzian waves, the latter being clearly included in the Act.[118] The right of the federal government to legislate generally with respect to broadcasting has been upheld on the basis of the Peace, Order, and Good Government clause,[119] the prevention of misuse of the medium,[120] and the need for preservation of Canadian cultural welfare.[121] The role of the CRTC is discussed at length in several cases. Its regulation-making power is interpreted widely, based on the language of the Act and the general proposition that it is not for the Court to determine whether a particular regulation will actually further the policy, but rather to make an objective analysis of whether the regulation falls under a heading within section 3.[122] On the question of CRTC authority over program content and standards, it was held by the Federal Court that this was a general power, rather than a specific one; the exercise of any form of "censorship" by the agency should be through the process for license

114. Capital Cities Communications, Inc. v. Canadian Radio Television Comm'n, [1978] 2 S.C.R. 141 (Can. S. Ct.).

115. *See* Re C.F.R.B and Att'y Gen. for Canada, 38 D.L.R.3d 335 (Ont. Ct. App. 1973).

116. National Indian Brotherhood v. CTV Television Network, [1971] F.C. 127 (Fed. Ct. Tr. Div.); National Indian Brotherhood v. Juneau [1971] F.C. 498 (Fed. Ct. Tr. Div.).

117. Capital Cities Communications, [1978] 2 S.C.R. 141; Regina v. Communicomp Data Ltd., 53 D.L.R.3d 673 (Ont. Co. Ct. 1974).

118. *See* cases cited note 117, *supra*.

119. Re C.F.R.B. and Att'y Gen. for Canada, 38 D.L.R.3d 335 (Ont. Ct. App. 1973).

120. *Id.* at 341-42.

121. Regina v. Communicomp Data Ltd., 53 D.L.R.3d 673 (Ont. Co. Ct. 1974).

122. Regina v. CKOY Ltd., 70 D.L.R.3d 662 (Ont. Ct. App. 1976); CKOY, Ltd. v. The Queen, 90 D.L.R.3d 1 (Can. S. Ct. 1978).

renewal or revocation and only for flagrant abuse by a licensee.[123] The ability of the CRTC to lay down policy guidelines of a binding nature on the industry, in the absence of specific regulations on the subject, was upheld.[124]

Freedom of expression has been in issue in only three situations: the role of the CRTC as a censor in the *Capital Cities* case;[125] the view that section 28 of the Broadcasting Act (which prohibits political broadcasts immediately prior to an election) was aimed at preventing misuse of the democratic process and did not infringe the freedoms of expression or speech;[126] and an opinion that a regulation requiring the consent of an interviewee prior to broadcast of a telephone conversation dealt with programming standards and did not constitute censorship in any form.[127]

It is apparent that the objectives and strategy of the Act have created problems for the courts and for the agency. The courts have attempted to fill the gaps created by a lack of reference to jurisdictional concerns, especially the omission of direct reference to cable operations. At the same time it is evident that they have been reluctant to comment to any significant extent on the exercise of discretion by the agency. The lack of clear priority among objectives has resulted in some tortuous reasoning. As one commentator has noted:

> The nature of section 3, and the administrative anomalies of the two-board system have forced the CRTC to make far-reaching policy decisions on an ad hoc and not entirely accountable basis. In some cases, these decisions have been concerned with areas not adequately covered by section 3, or any other section of the act.[128]

VI. THE TOWN AND COUNTRY PLANNING ACT—NEW ZEALAND

New Zealand has a small-scale, common-law-derived, unitary legal system. That jurisdiction also gained an enviable reputation, particularly in the first half of the twentieth century, for progressive social legislation. This tradition continued under the tutelage of the late Ralph Hannan as Minister of Justice in the 1960's and eventually pro-

123. See note 116, *supra*.
124. Capital Cities Communications, Inc. v. Canadian Radio Television Comm'n, [1978] 2 S.C.R. 141 (Can. S. Ct.).
125. *Id.*
126. Re C.F.R.B. and Att'y Gen. for Canada, 38 D.L.R.3d 335 (Ont. Ct. App. 1973).
127. CKOY Ltd. v. The Queen, 90 D.L.R.3d 1 (Can. S. Ct. 1978).
128. D. ELLIS, *supra* note 66, at 81.

duced (inter alia) the widely noted Accident Compensation Act of 1972.[129] In the field of legislation, New Zealand evolved the now well-known section 5(j) of its Acts Interpretation Act as early as 1889.[130] Thus, if any unitary common law jurisdiction was likely to be receptive to new statutory methods, New Zealand was a strong possibility.

As with all Western countries, New Zealand was faced in the twentieth century with a need to regulate land use. Indeed, such an enterprise was vital to a country dependent for its very existence on the efficient functioning of its agriculture-dominated economy. Planning necessarily involves making choices among the options that appear open and then securing their implementation. This in turn depends on the allocation of the necessary resources. In this sense planning is political. Thus, some method, whether it be brute strength, tradition, or legislation, will be required to resolve the conflict inherent in resource allocation. In terms of his actual functioning, the land use planner was conventionally a problem-solver within the parameters of set policies and traditions. However, planning theory gradually came to recognize that "goal formation is not only the most important, but also the most neglected part of the planning process. . . ."[131] This became the nub of evolving "good" land use planning legislation. The legislation would have to accommodate goal formation and the resolution of particular problems within a framework erected around these goals. The history of the New Zealand legislation reflects this gradual evolution and the articulation of national goal formation.

In the nineteenth and early twentieth centuries, there was sporadic and limited legislation.[132] The modern history of comprehensive land use legislation dates back to 1926 when towns and cities were given authority to prepare planning schemes "in such a way as will most ef-

129. *See* Palmer, *Accident Compensation in New Zealand: The First Two Years*, 25 AM. J. COMP. L. 1 (1977); T. ISON, ACCIDENT COMPENSATION: A COMMENTARY ON THE NEW ZEALAND SCHEME (1980).

130. *See* Section 5(j) of the Acts Interpretation Act, 1924, 15 Geo. 5, ch. 11:

> Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit.

131. G. CHADWICK, A SYSTEMS VIEW OF PLANNING 124 (1978). *But see* Arctander, *The Process Is the Purpose*, 58 J. ROYAL TOWN PLAN. INST. 313 (1972).

132. *See* K. PALMER, PLANNING LAW IN NEW ZEALAND 6-8 (1977); K. ROBINSON, LAW OF TOWN AND COUNTRY PLANNING 1-11 (2d ed. 1968). *See also* D.A.R. WILLIAMS, ENVIRONMENTAL LAW IN NEW ZEALAND (1980).

fectively tend to promote [the districts'] healthfulness, amenity, convenience, and advancement."[133] This act adopted a zoning method of control. That is, power was given to designate areas to be used exclusively or principally for particular purposes. Theoretically, every city and town had an *obligation* to prepare a scheme; but as with the air pollution problems under the United States Clean Air Act,[134] the date for compliance became a matter for conjecture. By 1953 only about half the New Zealand towns and cities had in fact enacted the required schemes.[135] The reasons varied: lack of adequate staff, lack of finances, the complexities of evolving a comprehensive plan, legal wrangles.

A new statute was enacted in 1953.[136] It contained in its final form three separate sets of policy objectives. Sections 3 and 18 set forth, respectively, the purposes of regional and district planning schemes. The former was "the conservation and economic development of the region . . . by means of the classification of the lands comprised therein for the purposes for which they are best suited by nature or for which they can best be adapted. . ."; the latter was "the development of the area . . . in such a way as will most effectively tend to promote and safeguard the wealth, safety and convenience, and the economic and general welfare of its inhabitants, and the amenities of every part of the area." Every regional authority and every city, town, and county council was required to promulgate a planning scheme no later than January 31, 1971, such scheme being predicated on a twenty-year planning period. The Act provided for various avenues of appeal and compensation. As each city and town began enacting its particular scheme, the Act began to have an important effect on the national way of life.

However, as soon as the schemes began to make an impact, the problems of ad hoc departures thereunder began to appear. All schemes based on a zoning approach have to struggle with a balance between some kind of internal integrity and sufficient flexibility to allow effective (economic) utilization of land. Hence, schemes of this type usually have some kind of variance mechanism or dispensing power built into them. The 1953 Act contained both safety valves. The dispensing power was in the form of a provision (added as the result of

133. Town Planning Act, 1926 § .3(1), *reprinted in* 5 THE PUBLIC ACTS OF NEW ZEALAND 1908-1931, at 488.

134. 42 U.S.C. §§ 7401 *et seq.* (formerly codified at §§ 1857 *et seq.*). *See* W. ROGERS, *supra* note 41, at 238; Train v. Natural Resources Def. Council, 421 U.S. 60 (1975).

135. K. ROBINSON, *supra* note 132, at 3.

136. Town and Country Planning Act, 1953, Stat. N.Z. c. 91 (1953).

a 1966 amendment) allowing a local authority to grant a "specified departure" from the provisions of that scheme "in the public interest."[137] In granting or refusing such consent the relevant local authority was directed to grant consent only where "[t]he effect of the departure will have little significance beyond the immediate vicinity of the property in respect of which the departure is sought, and the district scheme can properly remain without change or variation. . . ."[138] These applications were made initially to the planning committees of the particular local authority, with a right of appeal to a Town and Country Planning Appeal Board and subsequent judicial review on points of law.

Local authorities were notoriously unreliable at withstanding the considerable pressure from developmental interests for ad hoc exemptions. Local authorities, after all, wanted development and tax revenues. Early appeal board decisions also showed a disturbing ad hoc pattern.[139] This concern was redressed to some extent with the appointment of the Chairman of the important Number One Board, Judge Arnold Turner. Turner was the first judicial appointee to a planning appeal board in New Zealand with extensive legal experience in planning cases and a genuine appreciation of the purposes of the legislation. Under his careful craftsmanship, standards became discernible. Any departure from the provisions of an operative scheme was viewed as contrary to the public interest on the basis that respect for the integrity of the scheme should be maintained.[140] A strong burden accordingly rested on the applicant. The applicant was required to establish his case as a true exception which fell outside the scheme but did not offend overall planning objectives. Such an exception might arise, for instance, where a scheme was outdated or outmoded. Anything outside the range of those principles should more properly be dealt with by way of provisions allowing a change to the scheme itself.[141] Turner's judicial craftsmanship, on the whole, brought effective results. Some cases still slipped through local authorities, but the danger of wholesale

137. Town and Country Planning Amendment, 1966, § 35, 2 Stat. N.Z. 1641, 1667-68 (1966).

138. *Id.* § 35(2)(a).

139. Consider the volume of departures allowed in the cases reported in Vols. 1-3, N.Z.T.C.P.A.

140. *See, e.g.*, Caltex Oil (N.Z.) Ltd. v. Hutt County, 3 N.Z.T.C.P.A. 156 (1969); Highway Motors Ltd. v. Mt. Wellington Borough Council, 4 N.Z.T.C.P.A. 220 (1972); G.U.S. Properties Ltd. v. Timaru City, 4 N.Z.T.C.P.A. 12 (1971). *See also* Smeaton v. Queenstown Borough Council, 4 N.Z.T.C.P.A. 410 (1972).

141. *See* Town and Country Planning Act, 1953, Stat. N.Z. c. 91, §§ 29, 30. The relationship between a specified departure and a scheme change was clarified in Re an Application by the Mount Wellington Borough Council, [1963] N.Z.L.R. 609 (S. Ct., Auckland).

ad hoc departures was thwarted, particularly when it became clear that reviewing courts would not interfere with the general thrust of the Turner philosophy.[142]

Meanwhile new national policy perceptions were emerging. The provisions of some district schemes—and ad hoc departures thereto under the provisions just canvassed—led to concern in the early 1970's about the effect of urban development and pollution on the coastline and rivers and about urban encroachment onto the highly productive farmland on which the country's economy depended. Thus, in 1973, a new section 2B was added to the Act, containing for the first time a reference to "matters of national importance which were to be recognized and provided for in the preparation, implementation and administration" of the various district schemes. Three criteria were enumerated: the preservation of the natural character of the coastal environment and the margins of lakes and rivers, avoidance of undue encroachment on land with high value for food production, and prevention of sporadic urban subdivision in rural areas.

Finally, under a consolidated and revised Act[143] in 1977 a new section 3 was added which provided:

> 3. Matters of national importance—(1) In the preparation, implementation, and administration of regional, district, and maritime schemes, and in administering the provisions of Part II of this Act, the following matters which are declared to be of national importance shall in particular be recognized and provided for:
>
> (a) The conservation, protection, and enhancement of the physical, cultural, and social environment;
>
> (b) The wise use and management of New Zealand's resources;
>
> (c) The preservation of the natural character of the coastal environment and the margins of lakes and rivers and the protection of them from unnecessary subdivision and development;
>
> (d) The avoidance of encroachment of urban development on, and the protection of, land having a high actual or potential value for the production of food;
>
> (e) The prevention of sporadic subdivision and urban development in rural areas;
>
> (f) The avoidance of unnecessary expansion of urban areas into rural areas in or adjoining cities;

142. *See* Re a Decision of the Auckland City Council, 4 N.Z.T.C.P.A. 460 (1972); Turner v. Allison, [1971] N.Z.L.R. 833 (Ct. App. Wellington); Manukau City v. Pakurauga Community, 8 N.Z.T.C.P.A. 225 (Ct. App. Wellington).

143. Town and Country Planning Act, 1977, 3 Stat. N.Z. c. 121.

(g) The relationship of the Maori people and their culture and traditions with their ancestral land.

(2) The Minister may exercise all such powers as are reasonably necessary for promoting, in accordance with the provisions of this Act, matters of national interest and the objectives of regional, district, and maritime planning.

Faced with these provisions, the Town Planning Appeal Boards and such courts as were required to consider the matter held that these "national objectives" were "highly relevant . . . but not conclusive"[144] and that the local authority retained a discretion to grant a departure from the scheme provisions in a particular case.

A 1976 decision of the Chief Justice of New Zealand, Sir Richard Wild, was particularly influential.[145] Chief Justice Wild claimed that in effect section 3 created no presumption of any kind (despite the presence of the words "in particular" in the statute), and that the section 3 requirements merely added to the existing matters which were required to be considered in connection with the formation and administration of a district scheme. This is a clear case where the failure to understand the legislative history *and* social context of an amendment was fatal. After that decision, local authorities reverted to their former habits, and many doubtful ad hoc departures were granted.[146]

These provisions regarding "national objectives" have to be set alongside two other developments in New Zealand. In 1972, the New Zealand Parliamentary Cabinet established, without legislative authority, a Commission for the Environment. In 1973, a document entitled "Environmental Protection and Enhancement Procedures" was adopted by the same administration. Since that time this Commission has been involved in the preparation of extensive environmental impact reports and assessments of a variety not unlike those prepared by United States agencies under their NEPA obligations. This whole procedure has *never* been statutorily mandated; at least one commentator

144. K. PALMER, *supra* note 132, at 131. See particularly, Minister of Works & Development v. Waimea County Council, [1976] 1 N.Z.L.R. 379; Mangos v. Waimairi County, 6 N.Z.T.C.P.A. 25 (1976).

145. Minister of Works & Development v. Waimea County Council, [1976] 1 N.Z.L.R. 379.

146. The author appeared as counsel on several occasions in 1976 and 1977 before various city planning tribunals in the North Island of New Zealand and successfully obtained specified departure consents which in light of this discussion probably should not have been granted. In each case, the authority concerned was attracted by the "lure" of development and "overlooked" the destruction of affected agricultural land, which according to the soil scientists who were called to give evidence was among the highest quality in the world. The file and proceeding references are not presently available to the author.

has suggested that knowledge of the existence of NEPA litigation in the United States and "the desire to avoid similar consequences in New Zealand was one of the main reasons for rejecting a statute. . . ."[147]

The removal of "national objectives" even further from legal purview and almost totally into the political arena became more pronounced when over vocal opposition[148] the same administration enacted a National Development Act[149] in December 1979. This Act empowers an application by any person to a Planning Tribunal set up under the Act. After an environmental impact report has been prepared a recommendation is forwarded to the Governor-General in Council (effectively the Cabinet) who may (after "taking the report into account") declare a work of "national importance."[150] If a work is so "declared," that work is effectively taken out of the purview of twenty-two statutes in New Zealand which significantly affect environmental matters. The legislation as originally drafted provided that there was to be no judicial review of the Minister's decision that a work is essential for the purposes specified. As enacted, the legislation provided for a summary, expedited appeal direct to the New Zealand Court of Appeal.[151]

It is impossible to anticipate the ultimate outcome of challenges to this legislation. Preliminary skirmishing has already occurred over a government attempt to apply the National Development Act to the large-scale Aramoana aluminum smelter. The Environmental Defence Society Inc. unsuccessfully attempted to establish that the conditions prescribed by the Act for the valid exercise of the Governor-General's

147. *See* Mills, *Environmental Impact Reporting in New Zealand: A Study of Government Policy in a Period of Transition*, (pt. 1), 21 N.Z.L.J. 472, 475 (1979).

148. The editor of the New Zealand Law Journal stated, editorially: "This Bill is notable as attracting the least support and the most substantial criticism . . . of any legislation passed in recent years." Black, *Inter Alia*, 22 N.Z.L.J. 489 (1979). See also his earlier editorial, Black, *The National Development Bill*, 20 N.Z.L.J. 433 (1979).

149. National Development Act, 1979, 2 Stat. N.Z. c.147.

150. *Id.* § 11. A work of "national importance" is defined by § 3(3)(a) as being one which is a major work that is likely to be in "the national interest" and is "[e]ssential for the purpose of—

(i) The orderly production, development or utilization of New Zealand's resources; or

(ii) the development of New Zealand's self-sufficiency in energy; or

(iii) the major expansion of exports or import substitution; or

(iv) the development of significant opportunities for employment . . . and that it is essential a decision should be made promptly as to whether or not the consents sought should be granted. . . ."

151. *Id.* § 17(8).

powers had not been met,[152] and in a second decision in the same litigation, the New Zealand Court of Appeal unanimously disallowed the Crown's claim to privilege of Cabinet papers.[153] In a third appeal, mounted on behalf of property owners affected by the smelter, the same court conceded that "a streamlining of procedures is the very purpose of the National Development Act" and that "it is only to be expected that some rights will be done away with in the process."[154]

The New Zealand experience in this area cannot be simply summarized. The broad thrust of development is, however, discernible. In the developmental phase of the legislation, there was some relatively vague statutory phraseology to which a few good-quality judicial decisions added principles. This was followed by a second phase of statutory flirtation with broadly stated "national objectives." New Zealand courts and tribunals never seemed to make much out of those "national objectives." If anything, they watered them down. The third phase was the period of political ascendancy, when the entire issue of national objectives was for all practical purposes withdrawn from the courts; that withdrawal is now being resisted on traditional legal grounds. No successful challenge has yet been made against the legislation or decisions thereunder.

Perhaps the kindest thing that can be said of the New Zealand experiment is that as a legislative experiment it has not had time to grow to fruition. To put it in that positive light is, however, not to condone the deplorable excesses of parliamentary authority which have marked the later stages of the experiment. The New Zealand judiciary, on those occasions when it has been called upon to consider these various pieces of legislation, has shown little appreciation of the techniques required to grapple with statutes containing embedded policy statements. The court's failure in this area has been one of technique, but it has led to a failure of process.[155] The result is that the administration

152. Environmental Defence Society Inc. v. South Pacific Aluminum Ltd., [1981] 1 N.Z.L.R. 146.

153. *Id.* at 153. *See also* Northey, 7 NEW ZEALAND RECENT LAW (N.S.) 209, 210, 290 (1981).

154. Creednz Inc. v. Governor-General, [1981] 1 N.Z.L.R. 172, 177 (Cooke, J.). *Compare* (in Canada) Attorney-General of Canada v. Inuit Tapirisat of Canada, 115 D.L.R.3d 1 (1980) *and* (in England) Wiseman v. Borneman, [1971] A.C. 297. *See also* Northey, *Application for Review of the Validity of an Order in Council under the National Development Act* 1979, 7 NEW ZEALAND RECENT LAW (N.S.) 326 (1981); Re an Application by Petrolgas Chemicals NZ Ltd. and others under The National Development Act 1979, 8 N.Z.T.P.A. 106 (1981); Re an Application by NZ Synthetic Fuels Corporation Ltd. under The National Development Act 1979, 8 N.Z.T.P.A. 138 (1981).

155. If the rules of natural justice (which usually require the delivery of reasons) do not

of the day is now in absolute control of fast-track development legislation quite outside the purview of judicial review. The political process may well have overtaken independent appeal board and judicial review in any event. Yet had the judges evolved the sort of integrity in the national objectives provisions that, for instance, Judge Turner had enunciated with respect to specified departure applications, the withdrawal of one of the hallmarks of a democracy would have been seen more clearly for what it was: an inability on the part of the government of the day to face up to principled decision making.

VII. SYNTHESIS

A. Introduction

Good legal theory and workable legal instruments almost always follow good commercial or governmental practice, and not vice versa. In this sense, sound legal theory is necessarily a reactive response, cataloging changes in the forms and moods of a particular society. If this is accepted, it is likely that the obvious contemporary discontent with both the forms and performance of Western governments will ultimately find expression in new legal vehicles which will better express those concerns.

In all Western countries the case against governments seems to be much the same: a failure to evolve principled objectives by way of response to societal concerns, and a failure to find methods of implementing those objectives through subordinate policies and methodologies which both adhere to the general framework of the scheme and still retain some flexibility.

The kinds of statutes which have been considered in this Article seem to be the (as yet) poorly articulated and understood forbears of a different kind of statutory management model which is evolving in response to these contemporary governance concerns.

These statutes are not in fact adequately described as "new." They are the products of a half century of legal development. They represent an absorbing attempt to include in a comprehensive legal vehicle, elements of social control, dispute settlement and moral educa-

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apply to cases under the Act (as the Court of Appeal held in *Creednz*, note 154 *supra*) and if the injured party will usually be precluded from gaining access to the cabinet papers on which the operative decision was based (as the Court of Appeal also held in the *Environmental Defence Society Inc.* litigation, note 152 *supra*), applicants for review face a daunting task. They will have to demonstrate that the cabinet had regard to considerations other than the statutory criteria in reaching a decision to issue the development order without *any* of the documentation which reveals the processes by which the operative decision was reached.

tion. Their characteristics exemplify the most sophisticated, complex and interlocking forms of legal ordering yet devised in the Anglo-American legal world.

As such, a number of important questions arise. The most critical are: What are the attributes of the statute of this kind that make it most likely to succeed? How should the judges respond?

B. The Legislative Dimension

(1) *Goal formulation*. These are "big" statutes. They did not evolve overnight. Their gestation was slow, ranging from a decade to nearly a half century. In each case, other legal solutions to perceived dilemmas were tried and failed; in each case the legislature concerned was driven, almost in desperation, by the enormity of the issues it was facing to make a generalized pronouncement as to the goals it thought should be pursued. And those goals had in each case an over-arching, national character. This suggests several theoretical limitations and qualifications for this technique.

(a) Statutes having extensive declaratory provisions should only be employed if those declarations are *durable* in character. The process of amendment, once the enactment is in place, will be slow and fraught with political caprice.

(b) Draftsmen should observe the distinction usually made by public administrators between objectives and policies. Objectives deal with ends; policies deal with means to those particular ends. Administrators occasionally develop and routinely apply those policies. What section 101 of NEPA referred to as "policy" was nothing of the sort: it was a statement of goals or objectives. These distinctions are easy to state. They will not always be easy to apply. That difficulty need not impair their functional efficiency.

(2) *The Avoidance of Conflicts within Objectives*. Legislators and draftsmen should be encouraged to avoid conflicts within objectives sections. Such conflicts have had—on the historical evidence at least—a diluting, even paralyzing, effect on some legislative schemes. However, if the statute *is* to be designed to foster multi-functional objectives, as will often be the case, some means of resolving goal conflicts created by the statute itself will need to be urged upon legislators. The legislation *itself* should identify priorities in goals, or the legislation should explicitly state that the external agency is both mandated and required to address and resolve those goal priorities. The more precise the priority, the greater the chance of the statute achieving the per-

ceived legislative end. The Canadian experience is the most relevant in this dimension. As has been demonstrated, Canadian broadcasting legislation has been repeatedly undercut by a failure on the part of all elements of the system of Canadian government to resolve and enforce conflicting goals enunciated in the legislation itself.

(3) *Policy Formulation*. If the distinction between objectives and policies is thought to be useful and is maintained, the question will arise: who is to set the policies? Depending upon the particular jurisdictional and constitutional framework of the legislation, subordinate policies may need to be spelled out in some section of the legislation. That elaboration should, however, be kept separate and apart from the objectives section of the statute. Alternatively, the legislation should make it plain that some external agency or apparatus is to have responsibility for policy formulation and enactment via mechanisms for delegated legislation. The manner in which this is achieved in any particular jurisdiction will depend first upon the extent to which such delegation is constitutionally permissible and secondly upon the perceived necessity to involve an independent agency in the process. Far too often it is automatically assumed by legislators and draftsmen that an external agency will need to be involved. Why? Is it *really* more sensible (in Canada) for the CRTC to have authority for the evolution of subordinate broadcasting policies than, for instance, the federal Department of Communications? That department (through a designed and statutorily mandated policy evolution system) could just as efficiently undertake the task. Accountability would then come to rest where it should: at the desk of the elected Minister responsible for the particular portfolio. Flexibility, the great advantage of agency or departmental rule-making proceedings, is also retained.

(4) *Political Interference*. If the legislators' intention is that the regulatory agency be involved in goal-priority or policy-setting *and* regulatory roles, the historical evidence—at least in Canada and New Zealand—suggests that failure to mandate the agency to act in a genuinely independent way will prove an irresistible attraction to ad hoc political intervention. Consequential diminution in the impact of the statute will occur. When statutes have a quasi-constitutional aspect, it *should* be made difficult for politicians to water them down or to interfere in particular decisions, simply because otherwise rational and unimpeachable national aspirations prove to be politically unpalatable to a particular administration. Democratic theory *should* require overt,

visible legislative intervention before the agency is deflected from its course. If it is anticipated that the legislature will not be able to live with this degree of goal durability, the technique should not be employed in the first place.

(5) *Trigger Mechanisms*. Moral suasion has not been enough. A "trigger mechanism" is required to enable reviewing courts to activate the full potential of the objectives. NEPA and the New Zealand Town and Country Planning Act achieved their "successes" because there were specific provisions which the courts could use to enforce the integrity of the legislation. The problem for draftsmen seems to be to evolve a procedural sieve through which the really critical policy-planning decisions must pass. The sieve of profane politics is too coarse. It has no refining effect. Neither is the license renewal process suitable: it is much too draconian a solution (for regulators) to overturn vested interests. Both section 102 of NEPA and section 35 of the New Zealand Town and Country Planning Act proved to be ideal vehicles, because courts were able to interpret them as creating burdens requiring rationally demonstrated arguments before departures would be allowed from principles evolved and articulated through the legislative objectives themselves.

C. The Judicial Dimension

It is fashionable in North America today to wear a T-shirt proclaiming that "[somebody] does it better than [everybody else]." Judge Learned Hand was more accurate: "Nobody does [it] exactly right; great judges do it better than the rest of us."[156] What is "it" that great judges do right with respect to these declaratory statutes?

The phenomenon of judges working with their "eyes down" is well-enough known.[157] Such a technique is the hallmark of the classic common law lawyer. At common law judges struggle to solve particular controversies and achieve a respectable result in a way which is plausible and which will not do too much violence to the existing doctrinal fabric of the law. Change is generally incremental. The "market place of ideas"[158] that the common law represents usually affords sufficient manipulative scope for the exercise to be achieved by a judge with

156. L. HAND, THE SPIRIT OF LIBERTY 109 (1952).

157. The phrase is from S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 7 (2d ed. 1981).

158. Milsom, *The Nature of Blackstone's Achievement*, 1 OXFORD J. LEGAL STUD. 1, 1 (1981).

some degree of technical skill. There is a professional nobility, a kind of craftsmanship to be proud of, when it is well done. Much of the same techniques are employed with regard to conventional statutes.

It is when a judge is asked to "lift his eyes" and become something closer to a systems analyst or systems constructor that problems arise. What is then asked for is not competence but something closer to virtuosity. Virtuosity will then find expression in the building up or in the preservation of large-scale legislative schemes. Affirmative virtuosity consists in working seemingly discrete, even discordant, ideas into an integrated whole or in discovering a golden thread of principle. Preservative virtuosity consists in ensuring that an integrated whole is not destroyed when important objectives collide. This is not unlike the building of the common law, except that the process is happening on a much larger scale: the change in methodology is one of intellectual renewal for an age with similar instincts but different dimensions.

Sometimes there is a natural, flower-like kind of virtuosity. Such instances are wondrous, but abnormal, and can be put to one side. More often, virtuosity has to be acquired by less than Einsteinian judges. Then intensity and concentrated effort over an extended period and a line of cases will probably be required. This suggests that one way to see that virtuosity, in the sense it has been used here, is acquired, is to direct these complex public law problems to courts or judges who have or who can acquire real expertise in such matters. It is surely significant that the Bazelons, Skelly Wrights and Turners handle these statutes much better than judges who touch them only intermittently.

It also appears that American public law judges have generally handled the NEPA somewhat more adroitly than New Zealand and Canadian judges handled the statutes considered in this Article in their respective jurisdictions. One possible explanation for this is that United States judges have had greater experience in dealing with constitution-like documents.[159] Yet that answer seems too simplistic and obvious. And even if it were true, experience can be acquired. Another explanation—on much the same theme—might be that *numerically* there were many more American cases, and hence more chances to work out answers. There is also a substantial insight in Grant Gilmore's "compost heap" theory. In Gilmore's view, "American law has, from its late eighteenth-century beginnings, been self-consciously and

159. For comparisons of the role of the Supreme Court in Canada and the United States, see the proceedings of a conference on that topic in 3 CAN.-U.S. L.J., 1, 1-102 (1980).

self-critically aware of itself as a *system* which is supposed to make some kind of overall sense."[160] Hence, on the Gilmore theory, American law represents a "formal garden." English law (and presumably its Commonwealth derivatives) on the other hand "[came up] as it [were] from the compost heap of the centuries."[161] Systems builders apparently understand systems better than potterers.

Finally, a rich explanation could also be built around the concept of scale. British Commonwealth judges, at least in non-federal countries, still deal with relatively simple linear structures and concepts. So do United States judges in many kinds of situations, but the number of jurisdictions, nature of the questions raised, and enormity of the litigation have forced United States judges and draftsmen to evolve more sophisticated non-linear approaches and techniques than their Commonwealth counterparts.

All of this might suggest two things. In the long term, taking the matters raised in this Article to a deeper level of understanding will require both a much more complex analysis of the full range of potential legal methods by which large-scale societal phenomena and problems can usefully be ordered and also a comparative analysis of those methods. At least the "new" statutes have made a useful beginning with respect to that endeavour by adding, if not a completely new, then certainly a more refined vehicle to the range of alternatives.

In the short term, the "new" statutes offer a useful opportunity to wed the best of common law craftsmanship to larger scale ordering. The legitimacy of that endeavour is mandated by the statute itself and hence is both reviewable and has a solid foundation in democratic theory. In either case, lawyers are faced with a fresh approach to public law jurisprudence.

160. G. GILMORE, THE AGES OF AMERICAN LAW 10 (1977) (italics added). Gilmore perhaps did not appreciate that there is a long English intellectual tradition of indifference to theory. *See, e.g.*, R.H. TAWNEY, THE ACQUISITIVE SOCIETY (1920). "[Englishmen] are incurious as to theory, take fundamentals for granted, and are more interested in the state of the roads than in their place on the map." *Id.* at 1.

161. G. GILMORE, *supra* note 160, at 11.